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In the Supreme Court of the United States.

OCTOBER TERM, 1904.

FREDERICK A. HYDE, APPELLANT,
v.
JOHN H. SHINE, UNITED STATES marshal for the northern district of California, et al. } No. 406.

HENRY P. DIMOND, APPELLANT,
v.
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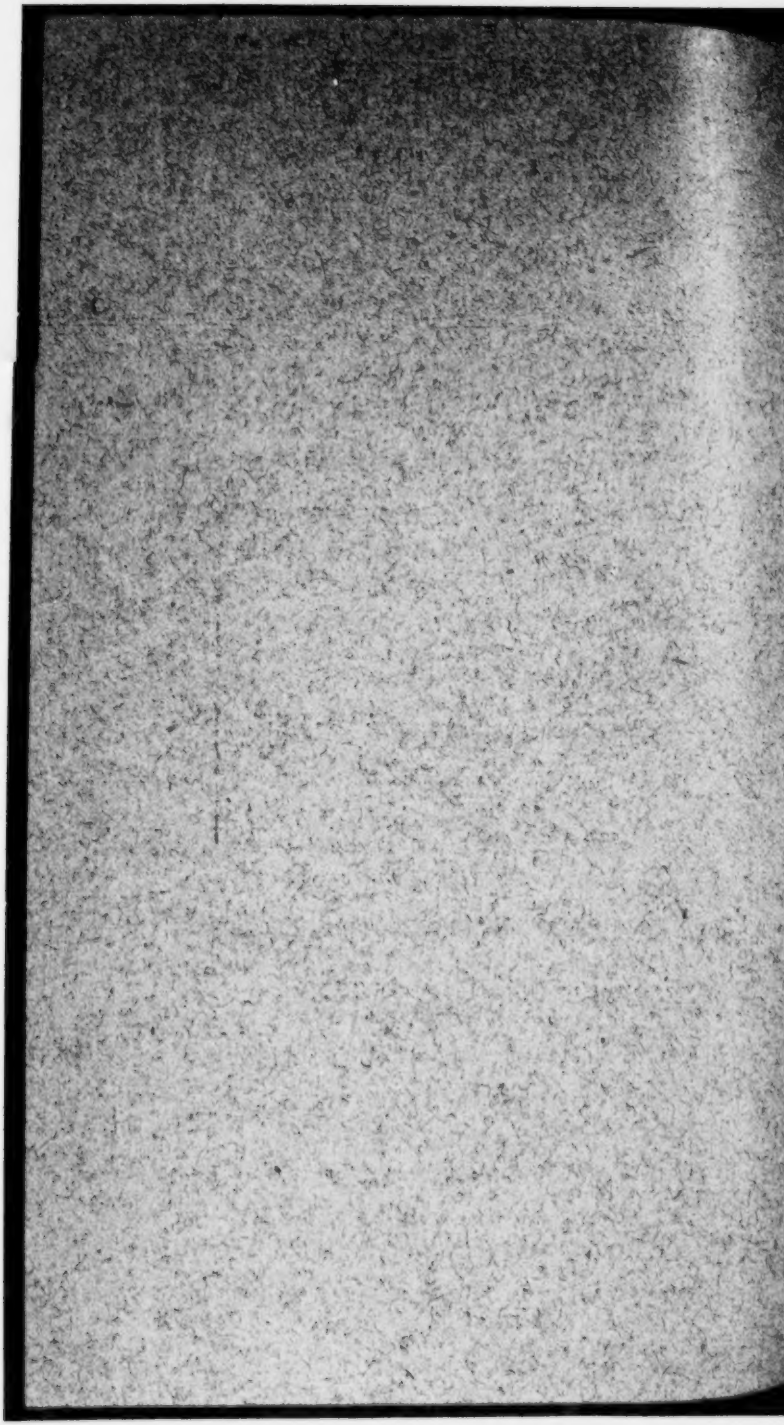
APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF ON BEHALF OF APPELLEES.



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HISTORY OF CASE.

Frederick A. Hyde, John A. Benson, Henry P. Dimond, and Joost H. Schneider were indicted by a grand jury in the supreme court of the District of Columbia at the January term, 1904, under section 5440 of the Revised Statutes, for conspiracy to defraud the United States out of the possession and use of, and the title to, divers large tracts of the public lands.

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Schneider was arrested in the District of Columbia and admitted to bail by the court in the sum of $12,000 for his appearance for trial. Benson was arrested in the southern district of the State of New York and proceedings were there instituted before a United States commissioner, under section 1014 of the Revised Statutes, for his removal to the District of Columbia for trial. Hyde and Dimond were arrested in the northern district of the State of California and proceedings were instituted against them jointly in that district before a United States commissioner, under section 1014.

At the latter proceedings, the identity of the defendants being admitted, the Government offered in evidence, as a sufficient showing of the existence of probable cause, a duly certified copy of the indictment, attached to the complaint upon which the warrant of arrest was issued. To the admission of the indictment as evidence the defendants objected, upon the grounds, substantially: (1) That the indictment does not charge an offense against the United States, because the acts charged against defendants do not amount to *fraud* against the United States, or show a purpose to *defraud* the United States; (2) that the indictment is fatally defective because the allegations thereof are uncertain, inconsistent, and repugnant; and (3) that the supreme court of the District of Columbia is without jurisdiction to entertain the indictment or to try the defendants for the offense sought to be charged against them.

These objections were overruled by the commissioner, who held the indictment to be sufficient *prima*

facie evidence of the existence of probable cause, but permitted the defendants to introduce evidence in their own behalf. They thereupon called the Government's witnesses, upon whose testimony the indictment was found, and examined them with the view to showing that the evidence before the grand jury was not sufficient to warrant the finding of the indictment, so as to overcome the effect of the indictment as evidence of probable cause The defendant Dimond volunteered as a witness in his own behalf. The witnesses were all cross-examined by the Government, and others were called in its behalf. Certain documentary evidence was also introduced. Thereupon the commissioner held both defendants for removal, and, in default of bail, committed them to the custody of the United States marshal.

Application was then made by the United States to the judge of the district court for the northern district of California for warrants of removal. The application was resisted by the defendants, who raised before the district judge the same questions against the validity of the indictment and against the jurisdiction of the court in which it was found.

The application was further resisted upon the ground that section 1014 of the Revised Statutes does not authorize the removal of a person from a *judicial* district of the United States to the District of Columbia. Other objections, more or less technical in their nature, were also presented. After full argument, Judge De Haven held the objections not well taken, and that section 1014, when read in connection with other

statutes of the United States, gives ample authority for the removal. Warrants of removal were accordingly granted. (132 Fed. Rep., p. 545.)

The defendants thereupon presented their separate petitions to the circuit court for the northern district of California for writs of *habeas corpus* and *certiorari*. In the petition by Hyde it is alleged that he is unlawfully restrained of his liberty for various reasons, substantially as follows:

(1) That such restraint is in violation of Article V of the amendments to the Constitution, providing that no person shall be deprived of his liberty without due process of law, in that the complaint, indictment, and evidence, which constitute the only authority for petitioner's arrest and commitment, charge him with no offense against the United States, and are insufficient to show a violation of section 5440, or of any other statute of the United States, and therefore the commissioner and district judge were without jurisdiction to order his arrest or commitment.

(2) That the provision of Article V that no person shall be held to answer for an infamous crime unless on a presentment or indictment of a grand jury is also violated because the petitioner is held to answer for an infamous crime without any sufficient or valid indictment of a grand jury.

(3) That such restraint is in violation of the provision of Article VI of the amendments, that in all criminal prosecutions the accused shall be informed of the nature and cause of the accusation, in that the indictment does not charge the petitioner with any offense

against the United States with sufficient clearness and certainty, for which reason, and because inconsistent, contradictory, and repugnant, the indictment is void.

(4) That such restraint is also in violation of Article IV of the amendments, providing that no warrants shall issue but upon probable cause supported by oath or affirmation, in that the indictment is wholly void and without effect as evidence to show the existence of probable cause, for the reasons, (*a*) that it does not charge with clearness and precision any offense against the laws of the United States, (*b*) that it does not inform petitioner of the nature and cause of the accusation against him, and (*c*) that it does not state facts tending to show a violation by petitioner of section 5440, or of any other statute of the United States, and no evidence was adduced at the hearing which establishes or tends to establish the existence of probable cause.

(5) That the provision of Article IV that the people shall be secure in their persons against unreasonable seizures is also violated, in that it would be unreasonable to remove petitioner from California to the District of Columbia for trial, for the reason that the offenses with which he is charged were committed, if at all, in the States of California and Oregon, and for the further reason that the supreme court of the District of Columbia is without jurisdiction to try the petitioner.

(6) That such restraint is in violation of the provision of Article VI of the amendments that in all criminal prosecutions the accused shall enjoy the right to a

speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, in that the offenses charged against the petitioner were committed, if at all, in the States of California and Oregon, and he is therefore entitled to a trial upon an indictment for said offenses by a jury either of the State of California or of the State of Oregon.

(7) That such restraint is in violation of section 1014 of the Revised Statutes, in that said section does not authorize the removal of a person from a *judicial* district of the United States to the District of Columbia.

The petition by Dimond covers all the points embraced in Hyde's petition, and in addition the petitioner alleges that the restraint of his liberty is unlawful for the further reasons: (1) That if removed to the District of Columbia for trial, he will be tried under laws enacted since the alleged offenses were committed, and will be thereby deprived of substantial rights under laws in force in said District at the time the alleged offenses were committed, in violation of Article I, section 9, of the Constitution, which prohibits the enactment of *ex post facto* laws; and (2) that if removed to the District of Columbia he will be deprived of the right of trial by jury, in violation of Article III, section 2, of the Constitution, and will be subject to trial by a jury whose findings may be reexamined otherwise than according to the rules of the common law, in violation of Article VII of the amendments to the Constitution.

The petitions were heard together in the circuit court before Judge Morrow, and upon consideration and argument the court held that the indictment sufficiently charges an offense under the laws of the United States, and that the supreme court of the District of Columbia has jurisdiction. The applications for writs of *habeas corpus* and *certiorari* were accordingly denied and the petitions dismissed (pp. 108 to 117, Hyde record).

The petitioners thereupon filed separate appeals to this court.

ERRORS ASSIGNED.

The assignments of error cover the various matters presented by the petitions and are the same in effect in both appeals, except that in the appeal by Dimond they cover the additional matters presented by his petition, and also aver that the circuit court erred in not holding the indictment defective because not concluding "against the peace and government of the United States."

ARGUMENT.

It is submitted in the outset that the only questions presented by the petitions and appeals which may be legally determined in these proceedings are the following:

I. Has the court in which the indictment was found jurisdiction of the offense?

II. Do the facts narrated and the acts charged in the indictment constitute an offense against the laws of the United States?

III. Does section 1014 of the Revised Statutes authorize the removal from a *judicial* district to the District of Columbia, for trial, of a person indicted for an offense committed in the District of Columbia?

The other matters complained of in the petitions and appeals do not involve questions properly determinable upon *habeas corpus* in removal proceedings. In the recent case of *Greene* v. *Henkel* (183 U. S., 249, 261–262), this court, speaking of a decision of a district judge granting a warrant of removal under section 1014 of the Revised Statutes in a case (as in this) *where an indictment had been found*, said that such a decision—

> * * * is not to be regarded as adjudging the sufficiency of the indictment in law as against any objection thereto which may subsequently be made by the defendants. That is matter for the tribunal authorized to deal with the subject in the other district. * * *
>
> Upon this writ the point to be decided is, whether the judge who made the order for the removal of the defendants had jurisdiction to make it, and if he had, the question whether upon the merits he ought to have made it is not one which can be reviewed by means of the writ of *habeas corpus*.
>
> Jurisdiction upon that writ in such a proceeding as this does not extend to an examination of the evidence upon the merits. * * *
>
> We do not think that by this order of removal the constitutional rights of the defendants are in anywise taken from them. The

> provision that no person may be held to answer for an infamous crime unless upon the presentment or indictment of a grand jury is not violated or infringed. If this so-called indictment be void for the reasons alleged, the place to set up its invalidity is the court in which it was found.

In the still more recent case of *Beavers* v. *Henkel* (194 U. S., 73), this court, after holding that within the spirit of the rule giving full effect to the records and judicial proceedings of other courts, an indictment found by a grand jury of a court having jurisdiction of the offense, should be accepted everywhere through the United States as at least *prima facie* evidence of the existence of probable cause, further held, as follows (87–88):

> With reference to other questions we remark that, so far as respects technical objections, the sufficiency of the indictment is to be determined by the court in which it was found and is not a matter of inquiry in removal proceedings (*Greene* v. *Henkel*, *supra*), that the defendant has here no right to an investigation of the proceedings before the grand jury, or an inquiry concerning what testimony was presented to or what witnesses were heard by that body. In other words, he may not impeach an indictment by evidence tending to show that the grand jury did not have testimony before it sufficient to justify its action. * * * Neither can a defendant in this way ascertain what testimony the Government may have against him and thus prepare the way for his defense.

These authorities, assuming that the indictment here in question contains a narration of facts and events sufficient to constitute an offense against the United States, and that the supreme court of the District of Columbia has jurisdiction of the offense, we submit, are conclusive of the proposition, that the objections, to wit, that the indictment was not found by a legally constituted grand jury; that it is not sufficiently clear and specific in its terms to inform defendants of the nature and cause of the accusation against them; that it is inconsistent, uncertain, and repugnant in its allegations; that it is defective because not concluding against the peace and government of the United States, and other like technical objections, are matters to be determined by the court in which it was found, and are not matters of inquiry in removal proceedings.

In this connection it is pertinent to refer to section 1025, Revised Statutes, which provides that:

> No indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant.

Nor are Dimond's particular objections as to jury trial, etc., matters for consideration in these proceedings. The laws of the District of Columbia make ample provision for trial by jury of persons indicted for offenses committed within the District; and it is

not to be assumed that the court of said District will not see that these defendants have and enjoy all rights and privileges guaranteed to them by the laws of said District, or by the Constitution of the United States. It will be the province and duty of that court to determine, in the first instance, what laws of the District are applicable to the case, and also to see that in their trial the defendants are not deprived of any rights to which they are entitled under the law. These are not matters which may be inquired into and determined in advance upon *habeas corpus* in removal proceedings. If errors to the prejudice of defendants should be committed by the trial court, ample provision is made for their correction upon appeal. (Code, District of Columbia, sec. 924.) While the right of appeal is also granted to the United States in such cases (id., sec. 935), it is with the proviso: "That if on such appeal it shall be found that there was error in the rulings of the court during the trial, a verdict in favor of the defendant shall not be set aside;" and it is not to be assumed that, even without such proviso, the appellate court would undertake to reexamine facts once tried by a jury contrary to the Constitution of the United States.

The warrant of removal in this case was granted upon the indictment, the complaint, and the evidence introduced before the commissioner, which were held by both the commissioner and district judge to be sufficient to show the existence of probable cause. The findings of the commissioner and of the district judge

in this respect are not reviewable in *habeas corpus* proceedings. As held in *Greene* v. *Henkel* (*supra*), jurisdiction upon writ of *habeas corpus* in removal proceedings does not extend to an examination and review of the evidence on the merits.

I.

Has the Supreme Court of the District of Columbia jurisdiction of the offenses charged in the indictment?

It does not appear from the record upon what specific grounds the contentions of defendants are severally based. There is no definite statement, either in their petitions in the circuit court or here. On the question whether the supreme court of the District of Columbia has jurisdiction, however, their contentions are as follows:

1. That said court is without jurisdiction under the new code of the District of Columbia (established by the act of March 3, 1901, 30 Stat., 1189), as to offenses alleged in the indictment to have been committed prior to the date when said new code went into effect, to wit, January 1, 1902, because by section 1641 of the new code it is provided that—

> All offenses committed and all penalties or forfeitures incurred in the District prior to the date on which this code is to take effect may be prosecuted and punished in the same manner and with the same effect as if this code had not been enacted.

2. That said court is without jurisdiction under the law as it existed prior to the new code, because under

the prior law—section 23, chapter 35, of the Compiled Statutes of the District of Columbia (1894), page 296—the criminal jurisdiction of said court extended only to crimes and misdemeanors committed in said District "not lawfully triable in any other court," and because the offenses charged in the indictment are legally cognizable by the Federal courts in the States of California and Oregon, and should be tried in those courts. The section referred to provides:

> That the criminal court of the District of Columbia shall have jurisdiction of all crimes and misdemeanors committed in said District, not lawfully triable in any other court, and which are required by law to be prosecuted by indictment or information.

3. That said court is without such jurisdiction, under either the old or the new law, because under section 730 of the Revised Statutes the offenses charged in the indictment are triable only in the *district* where the defendants were *found*, to wit, in the northern district of the State of California. Said section provides that—

> The trial of all offenses committed upon the high seas or elsewhere, out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or into which he is first brought.

The sections, or parts thereof, of the new code of the District of Columbia, in so far as material to be here referred to, are sections 2, 60, 61, 63, 64, and 83.

Sections 61 and 83 provide, respectively:

> *Jurisdiction.*—The said court shall possess the same powers and exercise the same jurisdiction as the circuit and district courts of the United States, and shall be deemed a court of the United States, and shall also have and exercise all the jurisdiction possessed and exercised by the supreme court of the District of Columbia at the date of the passage of this code.
>
> SEC. 83. *The criminal court.*—The trial of crimes and misdemeanors committed in the District of Columbia shall be in the supreme court of the District of Columbia holding a special term as a criminal court, except such misdemeanors as are within the jurisdiction of the police court, as to which said court shall have concurrent jurisdiction with said police court.

1. It is entirely clear that no change was made in the prior *jurisdiction* of the supreme court of the District of Columbia which could in any manner affect the rights of these defendants. It is expressly declared that said court shall continue as already constituted and shall have and exercise all the jurisdiction possessed by it at the date of the passage of the new code. It is also provided (secs. 63–64), equally as under the old law (secs. 9 and 22, chapter 35, Compiled Statutes, District of Columbia), that special terms of said court shall be held by a single justice thereof, to be known as the criminal court, for the trial of crimes and offenses committed within the District It was not intended by the new code to abolish the supreme court

of the District and create another and different court in its stead. On the contrary, the already existing supreme court was expressly continued with all the jurisdiction it then possessed and exercised.

The provision of section 1641 of the new code, to the effect that prior offenses may be prosecuted and punished in the same manner and with the same effect as if the new code had not been enacted, could not have been intended to apply to matters of *jurisdiction*. Evidently said section was intended to apply to matters pertaining to the *prosecution* and *punishment* of offenders separate and distinct from any question of jurisdiction.

2. The words "not lawfully triable in any other court," used in section 23, chapter 35, Compiled Statutes of the District of Columbia (act of June 22, 1874, 18 Stat., 193), refer only to any other court in the District of Columbia, and not to courts outside of said District. Prior to the new code there existed in the District of Columbia a police court for the trial of offenses against the United States committed within the District, not deemed capital or otherwise infamous crimes. (Ch. 56, Compiled Stats., District of Columbia.) Manifestly said section 23 was intended to provide for the trial of crimes and misdemeanors not lawfully triable in the police court. In *Callan* v. *Wilson*, decided in 1888 (127 U. S., 540), it appears to have been taken for granted that such was the state of the law in the District. It was held by this court that the offense charged was one which entitled the party to a trial by jury, and therefore was not lawfully triable in the

police court. But even if the contention of appellants in this respect were sustained, it could make no difference in this case, for the reason that the conspiracies mentioned in the several counts of the indictment are charged to have been entered into within the District of Columbia. Not only are the offenses alleged to have been committed *within* the District, but as to each and every count of the indictment one or more *overt acts*, in furtherance of the particular conspiracy therein charged, are alleged to have been committed by one or more of the conspirators within said District. In *Dealy* v. *United States* (152 U. S., 539, 546–547) this court, speaking of overt acts alleged to have been done in furtherance of the conspiracy charged, said:

> Still, again, it is urged that the overt acts, the inducing and persuading, are not charged to have been done within the limits of the United States. The conspiracy is charged to have been entered into in the State of North Dakota, and the proof necessary to make final entry at the land office named would have to be used in that State. * * * Hence, if the conspiracy was entered into within the limits of the United States and the jurisdiction of the court, the crime was then complete, and the subsequent overt act in pursuance thereof may have been done anywhere.

It is well settled that *wherever* conspirators act, there they renew or *continue* their illegal agreemeent; and such agreement is renewed or continued as to all wherever and whenever any one of them does an act

in furtherance of the common design. The law regards the illegal agreement itself, existing and in force, as the crime; and if the conspirators, or any of them, commit an act in furtherance of the conspiracy, in a different jurisdiction from that in which the illegal agreement was originally formed, such act operates as a renewal or continuance of the agreement.

People v. *Mather*, 4 Wend. (N. Y.), 229; *Commonwealth* v. *Bartilson*, 85 Pa., 482, 489–490; 6 Am. and Eng. Ency. Law, 844; *United States* v. *Rindskopf*, Fed. Cas., No. 16165, vol. 27, pp. 814–815; *Fire Ins. Cos.* v. *Mississippi*, 75 Miss., 24; *People* v. *Willis*, 52 N. Y., 808.

It has not been conceded by the Government, as repeatedly stated by defendants in their petitions, that the United States courts in the States of California and Oregon have jurisdiction of the offenses charged in the indictment. In a few of the counts of the indictment certain overt acts, alleged to have been done to effect the object of the conspiracy, are such acts as transmitting letters and documents by mail from certain points in one or the other of said States, to the Commissioner of the General Land Office at Washington. The letters and documents so transmitted were intended to be and were filed in the records of the selections to which they respectively relate, and the purpose thereof was to aid, expedite, and secure the approval of such selections by the Land Department. They were not intended to be, and in fact could not be, of any service to defendants until they were

filed in the General Land Office at Washington. Under the decisions of this court (*In re Palliser*, 136 U. S., 257, 267, and cases cited) there would seem to be no question that such acts were acts performed by defendants in the District of Columbia. But however this may be, the indictment charges no conspiracy in either the State of California or the State of Oregon. The conspiracies in the several counts are alleged to have been entered into in the District of Columbia, and the overt acts relied upon in connection therewith are alleged to have been done in furtherance of the conspiracies so charged.

3. Section 730, Revised Statutes, has no application to this case. By the Constitution (Art. III, sec. 2) it is provided that the trial of all crimes, excepting cases of impeachment, shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

It is clear that section 730 was intended to apply only to offenses committed out of the jurisdiction of *any State or district*. In other words, it was to apply to offenses committed on the high seas, or at other places where there were no courts authorized by law to take cognizance of them. (*Jones* v. *United States*, 137 U. S., 202, and cas. cit.; *Cook* v. *United States*, 138 U. S., 157.) The section can have no application to the offenses charged in this indictment, because said offenses are alleged to have been committed and were committed within the jurisdiction of a *district* of

the United States, to wit, the District of Columbia, and Congress has by law directed that offenses against the United States committed in said District shall be tried in the courts thereof.

II.

Do the facts narrated and acts charged in the indictment constitute an offense against the United States?

The indictment is based upon section 5440 of the Revised Statutes, which provides as follows:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do an act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than one thousand dollars and not more than ten thousand dollars, and to imprisonment not more than two years.

In brief, the indictment charges that the defendants, and other persons named with them, unlawfully conspired and agreed together to defraud the United States out of the *possession and use of, and the title to*, divers large tracts of the public lands, open and to be open to selection under the laws of the United States in lieu of lands included and to be included within the limits of forest reserves, established and to be established in the States of California and Oregon, by obtaining such possession, use, and title, for the profit, gain, and benefit of themselves, by means of a false and fraudulent practice whereby they were to obtain from the said States of

California and Oregon, *fraudulently*, and contrary to the laws of said States, title to and possession of school lands lying within the limits of such forest reserves, by the use of forged, false and fraudulent applications, affidavit, and other documents, to be filed with the authorities of said States, respectively, in the names of fictitious persons and in the names of persons not qualified under the laws of said States to purchase school lands, and whereby defendants were to cause to be relinquished to the United States, by forged, false and fraudulent relinquishments and conveyances, either directly through the names of such fictitious persons, or persons not qualified to purchase, or indirectly through themselves or their agents and attorneys, the fictitious, false and fraudulent titles so obtained by them, and in their behalf, from said States, knowing such titles to be fictitious, false, fraudulent, void and worthless, and the relinquishments or conveyances thereof to the United States to be forged, false and fraudulent; and this in exchange for patents of the United States for public lands lying outside of forest reserves. It is further charged, as a part of the conspiracy, that defendants were corruptly to induce certain officers of the United States Government, contrary to and in violation of their duties as such officers, by paying and giving to them money and other valuable consideration, to aid the defendants in carrying out and in effecting the object of their said conspiracy.

At the threshold of the discussion of this branch of the case there is presented an important question of

jurisdiction. Is it competent for the court, upon *habeas corpus* proceedings, to determine whether or not the scheme set forth in the indictment constitutes a conspiracy *to defraud* the United States within the meaning of section 5440 of the Revised Statutes?

The case of *Horner* v. *The United States* (143 U. S., 570) is authority against the jurisdiction. In that case Horner was held upon the charge of having unlawfully deposited in the post-office at New York a certain circular which concerned a lottery, to be conveyed and delivered by mail. The circular was set forth verbatim in the complaint. The circuit court refused to discharge upon *habeas corpus* and an appeal was taken to this court. The court said (p. 577):

> It is contended for Horner that the circular set forth in the complaint, relating to the redemption of the Austrian Government bonds, is not included in the prohibition of section 3894 of the Revised Statutes, as amended, and that he committed no offense by depositing such circular in the mail. But we are of opinion that that question ought not to be reviewed by us on this appeal. The point raised is that the Austrian bond scheme was not a lottery. That is a question properly triable by the court in which an indictment may be found against Horner. * * * The case presents for the determination of the court in which the indictment may be found the question as to whether the scheme was a lottery, and it is not for any court to determine it in advance on *habeas corpus*. If an inferior court or magistrate of the

United States has jurisdiction, a superior court of the United States will not interfere by *habeas corpus*.

In *Ex parte Rickelt* (61 Fed. Rep., 203), the circuit court for the southern district of Ohio followed the doctrine announced in the Horner case, *supra*.

In the case at bar the commissioner and the district judge had jurisdiction both of the subject-matter involved and of the persons of the defendants; and the grand jury of the District of Columbia also had jurisdiction of the subject-matter of the indictment (assuming the Government's position upon this question to be correct), because the offense, if any, was committed, as alleged in the indictment, within the District of Columbia. Therefore, the question whether the scheme was a conspiracy to defraud the United States within the meaning of section 5440 is a question to be determined by the supreme court of the District of Columbia, and not in advance upon *habeas corpus* proceedings.

Moreover, in this case the commissioner and the district judge having jurisdiction both of the subject-matter and of the persons have determined the question against the defendants, and it is well settled that the writ of *habeas corpus* can not be used as a writ of error. (*Horner* v. *United States*, 143 U. S., 570, 577; *Stevens* v. *Fuller*, 136 U. S., 468, 477; *In re Luis Oteiza y Cortes*, 136 U. S., 330, 334; *Ex parte Yarbrough*, 110 U. S., 651; *Ex parte Parks*, 93 U. S., 18, 23; *Ex parte Rickelt*, 61 Fed. Rep., 203.)

It seems to be well settled by the authorities that if the indictment or the complaint under which a per-

son is imprisoned does not charge any offense whatever, or if the action of the committing magistrate is wholly without his jurisdiction, the remedy by *habeas corpus* will lie. But this is when it is clear and manifest that the matter is wholly without the jurisdiction of the court or committing magistrate, or that the acts charged are necessarily innocent in themselves and such as the legislature could not properly declare to constitute a crime.

Jurisdiction includes the power to decide wrongly as well as the power to decide rightly. In *Ex parte Watkins* (3 Pet., 193), Chief Justice Marshall, speaking for the court, held that the question whether any offense was committed or not committed was a question which the trial court was competent to decide, and that if its judgment was erroneous, still it could not be disregarded until reversed, and that the question could not be inquired into upon *habeas corpus*.

The leading case on the subject, perhaps, is that of *Ex parte Parks* (93 U. S., 18). In that case Justice Bradley, speaking for the court, said (p. 20):

> But the question whether it was or was not a crime within the statute was one which the district court was competent to decide. It was before the court, and within its jurisdiction. No other court, except the circuit court of the same district, having concurrent jurisdiction, was as competent to decide the question as the district court.
>
> Whether an act charged in an indictment is or is not a crime by the law which the court administers (in this case the statute law of the

> United States) is a question which has to be met at almost every stage of criminal proceedings; on motions to quash the indictment, on demurrers, on motions to arrest judgment, etc. The court may err, but it has jurisdiction of the question. If it errs, there is no remedy after final judgment, unless a writ of error lies to some superior court; and no such writ lies in this case. It would be an assumption of authority for this court, by means of the writ of *habeas corpus*, to review every case in which the defendant attempts to controvert the criminality of the offense charged in the indictment.

The following question seems to state the true test of this matter: "Are the facts narrated in the indictment intrinsically immoral and such as the legislature might properly have intended to include within the terms of the statute?"

If so, then there is the mere question of law whether or not the acts committed are included within the statute, and as to this question of law the trial court or committing magistrate clearly has jurisdiction to decide wrongly as well as rightly.

If, on the other hand, the facts and acts narrated in the indictment are innocent in themselves and are not such as might properly have been declared by the legislature to constitute a crime, and if this fact is clear and manifest, it would be the duty of the court to determine the question on *habeas corpus*. Any other test than this would seem to make a *habeas corpus* proceeding the exact equivalent of a writ of error upon this question.

The test was recognized without being defined, in the case of *Ex parte Parks* by Mr. Justice Bradley, as follows (p. 20):

> At all events it is not clear and free from all doubt that the forgery is not within the terms of the statute.

In the case of *Ex parte Siebold* (100 U. S., 371, 376) the same learned justice, speaking for the court, said:

> It is stated, however, in Bacon's Abridgment, probably in the words of Chief Baron Gilbert, that "if the commitment be against law, as being made by one who had no jurisdiction of the cause, or for a matter for which by law no man ought to be punished, the court are to discharge." (Bac. Abridgment, Hab. Corp. B., 10.) The latter part of this rule, when applied to imprisonment under conviction and sentence, is confined to cases of clear and manifest want of criminality in the matter charged, such as in effect to render the proceedings void.

The facts narrated and acts charged in the indictment in the case at bar are intrinsically immoral and such as might properly have been included within the class of offenses described in section 5440 of the Revised Statutes. How can it be said, therefore, as a matter of law, that it is *clear* and *manifest* that the indictment does not state an offense against the United States, or that there is a clear and manifest want of criminality in the matter charged, or that it is free from doubt that the transactions are not within section 5440?

It is submitted that this question is at least involved

in serious doubt, and that the doubt ought to be resolved in favor of the Government, to the end that the court having jurisdiction of the indictment may itself determine whether or not the facts constitute a conspiracy to defraud the United States.

With these observations and authorities on the question of jurisdiction, we pass to a consideration of the indictment. As preliminary to this branch of the discussion, it is proper to state certain legislation of Congress on forest reserves, and decisions of the Land Department and of this court relating to such legislation, also the laws of California and Oregon, which provide for the disposal of school lands granted to those States, together with the relevant decisions of the supreme courts of said States.

By sec. 24 of the act of March 3, 1901 (26 Stat., 1095, 1103), it was provided—

> That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof.

Under the authority of this statute numerous forest reservations have been established in various States and Territories. By the act of June 4, 1897 (30 Stat., 11, 36), it is, among other things, provided:

> That in cases in which a tract covered by an unperfected *bona fide* claim or by a patent is

> included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected: *Provided further*, That in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims.

To the latter act certain amendments were made by an act approved June 6, 1900 (31 Stat., 588, 614); but the amendments are not material to this controversy.

The purposes of this legislation were to preserve the remaining forests on the public lands and (as expressly declared in the act of 1897, 30 Stat, p. 35), to improve and protect the forests within the reservations, for the purpose of securing conditions favorable to continuous water flows, and to a permanent supply of timber for the use and necessities of citizens of the United States. Manifestly, the Government would be greatly aided in accomplishing these objects by securing exclusive ownership and control of all lands within the reservations. To this end the act of June 4, 1897, was passed. It contains an offer by the Government to exchange any of its lands that are vacant and open to settlement for a like quantity of lands

within a forest reservation, covered either by an *unperfected bona fide claim* or by *a patent*. In the administration of the act the Land Department has construed the words *covered by a patent* to embrace any tract of land as to which the absolute fee simple title has passed out of the United States by any means which is the full legal equivalent of a patent. (*F. A. Hyde et al.*, 28 Land Decisions, 284, 290; Instructions: 28 Land Decisions, 328–329; 29 Land Decisions, 594, 596; *Gray Eagle Oil Company* v. *Clarke*, 30 Land Decisions, 570, 572.)

It is settled by the decisions of this court that under acts of Congress making grants of school lands to the various States the title to such lands (usually sections 16 and 36, as in the States of California and Oregon), passes by the grant, upon identification of the lands by survey, and therefore patents of the United States are not necessary to convey such title. See *Cooper* v. *Roberts*, 18 How., 173; *Beecher* v. *Wetherby*, 95 U. S., 517, 524–525; *Heydenfeldt* v. *Davey Gold Mining Company*, 93 U. S., 634; *McCreary* v. *Haskell*, 119 U. S., 327, 331. This principle has been followed by the Land Department in the administration of the act of June 4, 1897. It has been uniformly held that surveyed school lands within forest reserves are embraced within the meaning of the words *covered by a patent* as used in said act.

The statutes of California which provide for the disposal of school lands granted to that State, in so far as need be here referred to, are to be found in sections

3494, 3495 and 3500 of the Political Code of that State. Said sections, or the parts thereof directly applicable here, are as follows:

SEC. 3494. The unsold portion of the five hundred thousand acres granted to the State for school purposes, the sixteenth and the thirty-sixth sections, and lands selected in lieu thereof, must be sold at the rate of one dollar and twenty-five cents ($1.25) per acre in gold coin, payable, twenty per cent of the principal within fifty days from the date of the certificate of location issued to the purchaser; the balance, bearing interest at the rate of seven per cent per annum, in advance, is due and payable within one year after the passage of any act by the legislature requiring such payment, or before if desired by the purchaser.

SEC. 3495. Any person desiring to purchase any portion, not less than the smallest legal subdivision of any of the lands mentioned in section thirty-four hundred and ninety four, situated in any township which has been surveyed by the United States, must make an affidavit that he is a citizen of the United States, or has filed his intention to become such, a resident of this State, of lawful age; that he desires to purchase such lands (describing the same by legal subdivisions) under the provisions of this title; that there is no occupation of such lands adverse to any that he has, or if there is an adverse occupation, the affidavit must show that the township has been sectionized three months, and that the adverse occupant (giving his name) has been in such occupation more than sixty

within a forest reservation, covered either by an *unperfected bona fide claim* or by *a patent*. In the administration of the act the Land Department has construed the words *covered by a patent* to embrace any tract of land as to which the absolute fee simple title has passed out of the United States by any means which is the full legal equivalent of a patent. (*F. A. Hyde et al.*, 28 Land Decisions, 284, 290; Instructions: 28 Land Decisions, 328–329; 29 Land Decisions, 594, 596; *Gray Eagle Oil Company* v. *Clarke*, 30 Land Decisions, 570, 572.)

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SEC. 3495. Any person desiring to purchase any portion, not less than the smallest legal subdivision of any of the lands mentioned in section thirty-four hundred and ninety four, situated in any township which has been surveyed by the United States, must make an affidavit that he is a citizen of the United States, or has filed his intention to become such, a resident of this State, of lawful age; that he desires to purchase such lands (describing the same by legal subdivisions) under the provisions of this title; that there is no occupation of such lands adverse to any that he has, or if there is an adverse occupation, the affidavit must show that the township has been sectionized three months, and that the adverse occupant (giving his name) has been in such occupation more than sixty

days since the plat was filed in the United States land office; that he desires to purchase the same for his own use and benefit, and for the use or benefit of no other person or persons whomsoever, and that he has made no contract or agreement to sell the same. The affidavit must also state whether the land is or is not suitable for cultivation; and if it is, that the applicant is an actual settler thereon, and that he has not entered any portion of any lands mentioned in section thirty-four hundred and ninety-four, which, together with that now sought to be purchased, exceeds three hundred and twenty acres; but if the land is not suitable for cultivation, the affidavit must further state that the applicant has not entered any portion of such lands, which, together with that now sought to be entered, exceeds six hundred and forty acres. Lands unsuitable for cultivation may be sold in quantities not exceeding six hundred and forty acres to any one person, under the restriction other than as to actual settlement prescribed for the sale of cultivable lands.

SEC. 3500. Any false statement contained in the affidavit provided for in section thirty-four hundred and ninety-five defeats the right of the applicant to purchase the land, or to receive any evidence of title thereto, and if willfully false, subjects him also to punishment for perjury. Timber lands belonging to this State shall be sold for cash only, and the surveyor-general and register of the State land office must make and enforce all necessary rules and regulations to prevent the sale of or issuance

of any evidence of title to any timber lands of this State, except on payment, in cash, of the full price fixed therefor by law.

These statutes provide:

(1) That a purchase of school land from the State may be legally made only by a person who desires the land *for his own use and benefit*, and for the benefit of *no other person whomsoever*, and who has made no *contract* or *agreement* to sell the land;

(2) That these essential conditions must be shown to exist by the affidavit of the applicant to purchase;

(3) That *any false statement* contained in the affidavit defeats the applicant's right to purchase the land or to receive title thereto; and

(4) That not exceeding 640 acres of land may be purchased by any one person.

The statutes of Oregon providing for the sale of school lands granted to that State are in all material respects the same as those of California, excepting that only 320 acres may be sold to any one person. See sections 3617 and 3618, volume 2, Hill's Annotated Laws of Oregon (1887).

The supreme court of California has held in numerous cases that an applicant to purchase State lands must set out in his affidavit all the facts required by the statute to be stated therein, and that as to all such facts the affidavit must be true or the proceedings will be invalid. See *Taylor* v. *Weston*, 77 Cal., 534, 535; *Harbin* v. *Burghart*, 76 Cal., 119; *Mosely* v. *Torrence*, 71 Cal., 318; *Wrinkle* v. *Wright*, 136 Cal., 491. Other

cases to the same effect are: *McKenzie* v. *Brandon*, 71 Cal., 209, 211; *Plumm* v. *Woodruff*, 72 Cal., 29; *Davidson* v. *Cucamongo Co.*, 78 Cal., 4; *McIntyre* v. *Sherwood*, 82 Cal., 139; *Jacobs* v. *Walker*, 90 Cal., 43.

The same ruling has been repeatedly made by the supreme court of Oregon, with respect to affidavits required of applicants to purchase lands from that State. See *State* v. *Carlson*, 40 Oreg., 565, 67 Pac. Rep., 516; *Warren* v. *De Force*, 34 Oreg., 168, 55 Pac. Rep., 532; *Shively* v. *Pennoyer*, 27 Oreg., 33, 39 Pac. Rep., 396.

For convenience of reference, and to facilitate a clear understanding of the indictment, that part of the first count thereof which contains a general description of the conspiracy charged is given in an appendix to this brief, followed by an analysis showing the several conditions, or constituent parts of the conspiracy, which the pleader had to meet and cover, and stating the language of the indictment specially applicable to each of such conditions or parts. The other counts of the indictment refer to the first count for a description of the conspiracies charged in those counts, respectively. The several conditions mentioned will be here considered in the order in which they are stated in the analysis:

First. School lands were to be obtained from the States of California and Oregon, by and on behalf of the defendants Frederick A. Hyde and John A. Benson, in the names of *fictitious* persons, and such school lands were to be relinquished to the United States by means of false and forged relinquishments, assignments and

conveyances, in the names of such fictitious persons, in exchange for public lands to be selected and for titles thereto by patent to be obtained, by and on behalf of the said Hyde and Benson, in the names of such fictitious persons. This element of the conspiracy is clearly charged in the indictment, as will be readily seen from paragraph (1) of the analysis. (Appendix, p. 91.) It can hardly be questioned that the facts and circumstances narrated do constitute an offense against the United States under section 5440, because the United States would receive absolutely nothing of value, and would be induced to part with apparent record titles to its public lands, under which apparent record titles possession of the lands would be held for an indefinite period of time. It is settled law that land patents issued to fictitious persons convey no title and are absolutely void. In *Moffat* v. *United States* (112 U. S., 24, 31), this court, speaking on the subject, said:

> The patents being issued to fictitious parties could not transfer the title, and no one could derive any right under a conveyance in the name of the supposed patentees. A patent to a fictitious person is, in legal effect, no more than a declaration that the Government thereby conveys the property to no one. There is, in such case, no room for the application of the doctrine that a subsequent *bona fide* purchaser is protected. A subsequent purchaser is bound to know whether there was, in fact, a patentee, a person once in being, and not a mere myth, and he will always be presumed to take his

conveyance upon the knowledge of the truth in this respect.

The contention by defendants in the circuit court on this point was that even if the alleged scheme were consummated the United States would suffer no pecuniary or property loss thereby, and therefore would not be defrauded, inasmuch as its own patents issued to fictitious persons would be equally void and convey no title. In other words, it was argued that there would be simply an exchange of void titles—nothing more. This contention, we submit, is untenable. In the first place, by the consummation of the scheme, the Government would be defrauded out of the *possession and use* of lands covered by such apparent record titles, obtained by deception and fraud, for an indefinite period of time, to wit, until the fictitious character of its own patentees would be discovered. Until such discovery, those claiming under such apparent record titles would hold the possession of lands really belonging to the United States, and would appropriate and use the same, and the timber thereon, for their own benefit, and to the injury, detriment, and pecuniary loss of the Government. It is just as much an offense under said section 5440 to defraud the United States out of the possession and use of its public lands as to defraud it out of the title to such lands. And it is to be remembered that, as to each and all of the elements or parts of the alleged conspiracy, it is charged in the indictment that the object and purpose thereof were to defraud the United States out of the possession and use of its public lands as well as out of the title thereto.

In *United States* v. *Thompson et al.* (29 Fed. Rep., 86), the indictment charged that the defendants had conspired to defraud the United States of its title to, or dominion over, the lands in question, but the court found that "at most, the purpose of the defendants was to deprive the United States of the possession of this land for an indefinite time, or until a purchaser of the location was found." The reasoning of the court shows clearly that if the indictment had alleged a conspiracy to defraud the United States out of the possession and use of its lands it would have set forth an offense against the United States under section 5440.

Moreover, it is established by decisions of this court that the Government holds its public lands as a part of its *trust;* that is, as trustee for the people of the United States (*United States* v. *Beebe*, 127 U. S., 338, 342; *Knight* v. *United States Land Association*, 142 U. S., 161, 177–178, 181; *McDaid* v. *Oklahoma*, 150 U. S., 209, 215–216); and, by the consummation of the scheme under consideration, the people would be defrauded out of their right under the public land laws to secure title to the particular lands covered by such apparent record titles until the discovery of the fictitious character of the patentees.

Again, the Government would suffer pecuniary loss by the consummation of such scheme, because the time of its officers and employees, appointed and employed for the purpose of administering the public land laws for the benefit of the people, would be occupied in the futile work of passing upon apparently genuine and

true, but in fact fraudulent and false, records of selections under the act of June 4, 1897, and in issuing patents upon such false records.

Second. School lands were to be obtained from said States of California and Oregon, by and on behalf of the defendants Hyde and Benson, in the names of *fictitious* persons, and, by means of false and forged relinquishments, assignments and conveyances, such school lands were to be relinquished, transferred and conveyed to the United States in the names of *real* persons, in exchange for public lands to be selected and for titles thereto by patent to be obtained, by and on behalf of the said Hyde and Benson, in the names of such real persons.

It will be seen from paragraph (2) of the analysis (Appendix, p. 92) that this element of the conspiracy is also clearly charged in the indictment, though some doubt is expressed on the point in the opinion rendered by the district judge. It is stated in specific terms in the indictment that school lands were to be obtained from said States of California and Oregon, by and on behalf of the said Hyde and Benson, by making and filing with the proper authorities of those States, respectively, applications for the purchase of such lands "in the names of fictitious persons," and by supporting such applications with forged, false and fraudulent affidavits, which affidavits "would purport to be * * * the affidavits of real persons," whereas in truth and in fact they "would be the affidavits of fictitious persons and would not be the affidavits of real persons or affi-

davits sworn to by any person;" and that the said Hyde and Benson were, "by means of false and forged relinquishments, assignments and conveyances," to cause to be relinquished, assigned, transferred and conveyed to the United States, "indirectly," either through themselves or through their agents and attorneys—real persons—"the pretended rights of such fictitious persons respectively," and this, in exchange for public lands to be selected and for titles thereto by patent to be obtained. by and on behalf of the said Hyde and Benson, "in the names of such * * * real persons."

We are unable to conceive how it can be claimed that these facts do not constitute an offense against the United States under section 5440 of the Revised Statutes. In the event of the consummation of the conspiracy in this respect, the States of California and Oregon would not have parted with either the legal or the equitable title to their school lands (since, as has been shown, a patent to a fictitious person is the same as a declaration on the part of the State that it has granted the land to no person), whereas the United States would have been fraudulently induced to part with titles to its public lands by issuing patents to real persons who could transfer the titles so obtained to *bona fide* purchasers, who would be able to defeat a recovery of such lands by the United States. The United States, on the other hand, would have received absolutely nothing of value in return for the lands so conveyed by its patents. The proposition that this would be an actual fraud upon the Government is self-evident, and needs no argument to support it.

Third. School lands were to be obtained fraudulently from said States of California and Oregon, by and on behalf of the said Hyde and Benson: (1) In the names of *fictitious* persons upon assignments of certificates of purchase to be issued by said States, respectively, upon applications to purchase to be filed in the names of persons not qualified to purchase; and (2) in the names of real persons, (*a*) upon assignments of certificates of purchase to be issued by said States, respectively, upon applications to purchase to be filed in the names of fictitious persons, (*b*) upon assignments of certificates of purchase to be issued by said States, respectively, upon applications to purchase to be filed in the names of persons not qualified to purchase, and (*c*) directly upon applications to purchase to be filed in the names of persons not qualified to purchase (where there were to be no assignments of the certificates of purchase); and such school lands, so fraudulently obtained, were to be relinquished, and caused to be relinquished, to the United States by real persons, in exchange for public lands to be selected and for titles thereto by patent to be obtained, by and on behalf of the said Hyde and Benson, in the names of such real persons.

These several elements of the conspiracy are all embraced in the indictment, as is shown by paragraph (3) of the said analysis. (Appendix, p. 94.)

In this connection it should be observed that the laws of California and Oregon authorizing the sale of school lands granted to those States provide that

certificates of purchase shall be issued to persons who have applied to purchase such lands, upon the required cash payment being made, and that such certificates of purchase, and all rights acquired thereunder, shall be subject to sale, by deed or assignment, executed or acknowledged in the manner required for other conveyances of real property; and that upon the surrender of such certificates of purchase, either by the original holders or by assignees thereof, accompanied by payment of the balance of the purchase money, patents shall issue to the original holders or to the assignees, as the case may be. See sections 3514, 3515 and 3519 of the Political Code of California (1886), and section 3605 of volume 2, Hill's Annotated Code of Oregon (1887). This will explain the use in the indictment, in connection with the description there given of the several means which were to be used by the defendants to obtain school lands from said States, and in connection with the filing of applications to purchase such lands, of the words "assignments of the same, and of the certificates of purchase thereof," meaning thereby assignments of the lands applied for and assignments of the certificates of purchase to be issued upon such applications as aforesaid.

As to the school lands which were to be obtained from said States in the names of fictitious persons, by the means stated, and which the said Hyde and Benson were to cause to be relinquished to the United States in the names of real persons, in exchange for public lands to be selected and titles thereto, by patent, to be

obtained in the names of such real persons, the result would be the same as stated under paragraph *Second* of this discussion. In such instances, were the conspiracy to be consummated, the United States would receive absolutely nothing of value by the relinquishment to it of the State titles issued to fictitious persons, whereas the titles to its public lands, conveyed by its patents in exchange for such fictitious titles, could be transferred to *bona fide* purchasers, who could defeat any attempt on the part of the Government to recover the same.

As to the school lands which were to be obtained in the names of real persons by filing applications to purchase such lands, and assignments of the same, and of the certificates of purchase thereof, in the names of fictitious persons, or by filing applications to purchase such lands, and assignments of the same, and of the certificates of purchase thereof, in the names of persons not qualified to purchase, or by filing only applications to purchase such lands, unaccompanied by assignments of the same, or of the certificates of purchase thereof, in the names of persons not qualified to purchase; and by supporting such applications, as charged in the indictment, with false and fraudulent proofs, to wit, with affidavits which would be forged, fraudulent and false, in that they would purport to be, some the affidavits of real persons and others the *bona fide* sworn affidavits of the persons whose names were signed thereto, whereas in truth and in fact the former would be the affidavits of fictitious persons and would not be the affidavits of real persons or affidavits sworn

to by any person, and the latter would not be the *bona fide* or sworn affidavits of the persons whose names were signed thereto, because, for the reasons set forth in the indictment, such latter affidavits would not be true, but would state matters which were untrue, and also because such latter affidavits would not in truth and in fact ever have been sworn to at all by any of the persons whose names were signed thereto—there can be no question that such lands and the titles thereto would be illegally and fraudulently obtained from said States. And it is further charged in the indictment, as a part of the alleged conspiracy, that the said Hyde and Benson were to require and procure such school lands and the titles thereto, so fraudulently obtained from said States, to be relinquished, assigned, transferred, and conveyed to the United States, either directly, or indirectly through themselves or their agents and attorneys, in exchange for public lands to be selected and for titles thereto by patent to be obtained by and in their own behalf.

It is thus seen that the alleged conspiracy contemplated the imposition upon the United States by defendants, under the forms of law, but in reality through fraud and deception, of fraudulent and defeasible titles to State school lands in exchange for perfect titles from the United States for its public lands.

The defendants do not deny that the facts and circumstances alleged are in themselves fraudulent, or that the execution of the scheme would be a fraud against the States of California and Oregon; but they

contend that there was no conspiracy *to defraud the United States*, for the reason that, even if the scheme were carried into execution, the Government would become a *bona fide* purchaser of the fraudulent State titles, and therefore would not be *defrauded* within the meaning of said section 5440 of the Revised Statutes, because it would sustain no *direct pecuniary* or *property* loss.

It is proper to be stated in this connection that the transactions by defendants, through the means and methods here referred to, cover by far the larger portion of the public lands involved in the conspiracy as generally described. The question whether, in this respect, the facts and circumstances narrated in the indictment constitute an offense against the United States within the meaning of section 5440 is therefore very important to the Government.

As already stated, one of the purposes of the act of 1897 was to enable the Government to acquire title to and absolute control of lands covered by claims of settlers, or by patent, within the limits of forest reserves. The offer by the Government is to exchange its public lands outside of forest reserves for any lands within such reserves covered by an "unperfected bona fide claim" or "by a patent." It is provided that the settler of an unperfected *bona fide* claim, or the "owner" of any tract covered by a patent, may, if he desires to do so, relinquish the tract to the Government and select in lieu thereof a tract of vacant land open to settlement, not exceeding in area the tract covered by his claim or

patent, as the case may be. If the tract be covered by a patent, the offer by the Government is to exchange titles with the *owner* thereof and the owner only.

The question then arises: What is the meaning of the term "owner" as used in this act. In Anderson's Law Dictionary (citing *Dow* v. *Gould Mining Company*, 31 Cal., 649) *owner* is defined as follows: "He who has dominion over a thing, which he may use as he pleases, except as restrained by the law or by an agreement." In Bouvier's Law Dictionary the word *owner* is defined thus: "He who has dominion of a thing, real or personal, corporeal or incorporeal, which he has a right to enjoy and do with as he pleases."

It has been held in numerous decisions of the courts that the term *owner*, when applied to land without any qualifying words, means a person who holds the *absolute fee simple* title to the land.

Johnson v. *Crookshanks* (21 Ore., 339) was an action to recover possession of real property. The plaintiff alleged that he was the owner and entitled to the possession of the premises demanded. In the course of its opinion, the supreme court of Oregon said:

> The complaint in the case at bar alleges that plaintiff is the owner of the property sought to be recovered. This is undoubtedly an allegation of title in the plaintiff. The word owner has a definite meaning, and is one who has dominion over a thing, which he may use as he pleases, except as restrained by law or by an agreement. (Anderson's Law Dict., title Owner.) The precise meaning perhaps

> depends upon the nature of the subject-matter and the connection in which it is used; but when applied to real estate, without any qualifying words, in common as well as legal parlance, it *prima facie* means an owner in fee.

In *Fallbrook Irrigation District* v. *Abila* (106 Cal., 355, 362–363), the supreme court of California, speaking on the same subject, cites and approves the decision in *Johnson* v. *Crookshanks*.

See also *Rockford Insurance Company* v. *Nelson*, 65 Ill., 415; and *McFeters* v. *Pierson*, 15 Colo., 201, 203.

These authorities clearly show that the term *owner* as applied to land, without any qualifying words, means one who holds the absolute fee simple title—the largest estate that can be held in land. This is the meaning which the Land Department has given to the term in the administration of the act in question. Among the first rules and regulations adopted on the subject was one which provided that as to land covered by a patent the owner thereof must execute a deed conveying the same to the United States, have the deed recorded, and furnish an abstract of title duly authenticated showing "chain of title from the Government back to the United States." See paragraph 16, Instructions of June 30, 1897 (24 Land Decisions, 589, 592). Later instructions are to the same effect (31 Land Decisions, 372, 374, paragraph 14).

In the case of *Kern Oil Company et al.* v. *Clarke* (30

Land Decisions, 550, 560), the Secretary of the Interior held that—

> The act clearly contemplates an exchange of equivalents. Such is the unmistakable import of its terms. In the case of the relinquishment of patented lands title is to be given by the Government for title received. When an unperfected *bona fide* claim is relinquished, the claimant is to be placed in the same situation with respect to the selected tract that he occupied with respect to the tract relinquished. If a complete title is surrendered, the right to a complete title in return is secured. If only an unperfected claim is surrendered, the same rights are secured with respect to the new claim that were possessed with respect to the claim surrendered.

In the case of *Cosmos Exploration Company* v. *Gray Eagle Oil Company* (190 U. S., 301, 308–309), the court, speaking of the act of 1897, said:

> The selector has not acquired title simply because he has selected land which he claims was at the time of selection vacant land open to settlement, nor does the filing of his deed conveying the land relinquished and the abstract of title with it show necessarily that he was the *owner* of the land as provided for by the statute. So far as his action goes, it is an assertion on his part that he was the *owner in fee simple* of the land he proposed to relinquish, and that the deed conveys a *fee-simple title* to the Government, and also that he has selected vacant land which is open to settlement, and

> that therefore he is entitled to a patent for such land. These assertions may or may not be true.

To construe the term "owner," therefore, as meaning simply the holder of the naked legal title to the lands sought to be relinquished, regardless of whether he possesses the equitable title or not, as is contended by defendants should be done, we submit would be contrary to every rule. The act raises no presumption and contains nothing to indicate that the Government is willing to accept defeasible titles in effecting exchanges thereunder. The Government offers for its public lands a full, complete and indefeasible title, and it would be wholly unreasonable to suppose that Congress intended or contemplated that the Government should receive or accept in exchange therefor a fraudulent and defeasible title.

Moreover, when the offer of exchange contained in the act is accepted by an "owner" of lands covered by "a patent," by his relinquishing such lands to the United States and selecting the particular public lands he wishes to acquire, in payment for the lands relinquished, the offer becomes an executory contract of purchase between the United States as purchaser and such "owner" as seller, and should be construed according to the rules and principles of law applicable to such contracts between individuals. In Maupin on Marketable Title to Real Estate, pages 20–21, section 5, that author states:

> The purchaser is entitled to require from the vendor, in the absence of any provision in the

> contract, a good marketable title, free from all defects or incumbrances. * * * And the rule is general that a contract for the sale of lands which is silent as to the title or interest to be conveyed, implies an agreement to convey not only an unincumbered and indefeasible estate, but such an estate in fee simple, that is, the largest estate that can be had in the premises.

See also the same authority, pages 28–30.

In the case of *Inness* v. *Willis* (16 Jones & S., N. Y., 188, 192) it is held that *as between individuals*—

> The vendor in an executory contract for the sale of lands, *in the absence of express statements to the contrary*, represents and warrants that he is the owner of the property which he assumes to sell.

But the rule as between the Government and an individual is still stronger, if such a thing be possible, because as between the Government and its grantee even an executed contract of conveyance must be construed most strongly in favor of the grantor—the Government. See *Leavenworth, etc., R. R. Co.* v. *United States*, 92 U. S., 733, 740.

By concealing the fact that their titles were obtained by fraud, the defendants have made false representations to the United States and have been guilty of fraud and deceit. They attempted to impose upon the United States titles which they knew were fraudulent and could be defeated by the States of California and Oregon, and at the same time, by means of their deeds of relinquishment, abstracts and other evidence

of title, they represented that such titles were complete, perfect and indefeasible.

> The vendor is guilty of fraud if he conceals a fact material to the validity of the title, lying peculiarly within his own knowledge, and which it is his duty to disclose. It is as much a fraud to suppress the truth as it is to utter a falsehood. * * *

In *Stewart* v. *Wyoming Ranche Co.* (128 U. S., 383, 388) it was said by this court, that—

> * * * if, with intent to deceive, either party to a contract of sale conceals or suppresses a material fact, which he is in good faith bound to disclose, this is evidence of and equivalent to a false representation, because the concealment or suppression is in effect a representation that what is disclosed is the whole truth.

It is difficult to understand how it can be reasonably claimed that the acts of the defendants were not grossly fraudulent from beginning to end and that they do not constitute an offense against the United States within the meaning of section 5440, which denounces a conspiracy "to *defraud* the United States *in any manner or for any purpose.*" The object of the defendants was to obtain from the United States the possession and use of, and patents for, its public lands. Nothing was done or contemplated that did not have that object in view.

In *United States* v. *Fox* (95 U. S., 670, 672) it was held by this court that—

> Any act committed with a view of evading the legislation of Congress passed in the execu-

> tion of any of its powers, or of fraudulently securing the benefit of such legislation, may properly be made an offense against the United States.

It can not be denied that the acts and transactions of these defendants, set forth and charged in the indictment, were intended to be and were in evasion of the requirement of the act of 1897, that relinquishments of lands covered "by a patent" shall be made by the "owner" of such lands; or that the purpose of such acts and transactions was fraudulently to secure the benefit of that legislation. The acts charged in the indictment, therefore, are such as might properly be made an offense against the United States, and we submit that they are clearly within the condemnatory provisions of said section 5440 of the Revised Statutes. The section is broad and comprehensive in its terms. As was said in the case of *United States* v. *Thompson*, decided in 1886 by the United States circuit court for the district of Oregon (29 Fed. Rep., 86, 87)—

> It must therefore be construed to include every conceivable case of conspiracy to defraud the United States; that is, to deprive or divest it of any property, money, or thing otherwise than as the law requires and allows.

To constitute fraud it is not necessary that there should be in all cases direct pecuniary or property loss involved. The violation of rights, either of an individual or of the Government, may be far more serious in its results than pecuniary loss. Conduct which operates to prejudice the rights of the Government, or to

pervert the due administration of its laws, might result in very much greater injury to it than any loss of money or other thing of mere money value.

In *United States* v. *Whalen*, decided in 1868 by the United States district court of the district of Massachusetts (28 Fed. Cas., No. 16669), it was said of this statute that it—

> * * * has a wide application, and covers all frauds which human ingenuity can devise. * * *

And further—

> * * * Conspiracy is an agreement by two or more persons to commit an unlawful act or acts. It is sometimes defined to be an agreement to commit an act in itself unlawful, or to do an act lawful in itself by unlawful means. Either the final result or the means are to be unlawful. There is no special force in this division, inasmuch as something unlawful is to be done. This is the common-law definition independent of statute, and if the statute spoke simply of a conspiracy, it ought perhaps to be construed with reference to the common-law definition. But in this statute the word has a more comprehensive meaning because it includes defrauding the United States in any manner whatever, whether the fraud had been declared a crime by any statute or not. It is therefore immaterial to consider whether the acts were a crime independent of the statute, if there is shown a conspiracy to defraud the Government.

In *Mitchell* v. *Kintzer* (5 Pa. St., 216), the supreme court of Pennsylvania held as follows:

> It may safely be averred that all deceitful practices in depriving or endeavoring to deprive another of his known right by reason of some artful device or plan contrary to the plain rules of common honesty is fraud.

In *Bunn, Raguel & Company* v. *Ahl* (29 Pa. St., 387) it was held by the same court that—

> Fraud consists of conduct that operates *prejudicially* on the rights of others, and is so intended.

In American and English Encyclopedia of Law (second ed., vol. 14, p. 140) it is said:

> It has been held in a number of cases that to entitle a person to relief because of having been induced by fraud to enter into a contract, he need not show that he has actually sustained any pecuniary damages by reason of the fraud, provided he has been otherwise prejudiced. * * * Thus it has been held that pecuniary damage is not necessary to entitle a person to relief by way of rescission; but that it is enough for him to show that he has been induced by material false and fraudulant representations to enter into a contract which he would not have entered into but for such representations.

Among the cases cited in support of the text are the following: *Allaire* v. *Whitney*, 1 Hill (N. Y.), 484; *Northop* v. *Hill*, 57 N. Y., 351; *MacLaren* v. *Cochran*, 44 Minn., 255; and *Williams* v. *Kerr*, 152 Pa. St., 560.

In *Williams* v. *Kerr*, a case of the sale and convey-

ance of land induced by false representation, the court said (p. 565):

> It is quite true that fraud without the concurrence of injury affords no ground for relief in equity. But it is such injury as will be redressed to obtain from an owner, by a false representation of a fact which he deems material, property which he would not otherwise have parted with upon the terms which he is thus induced to accept. If this were not so, a conveyance obtained by any other fraud than such as was practiced in this case, could be upheld by proof that the grantor was in no worse condition than if he had not made it.

The other authorities cited are precisely to the same effect: *MacLaren* v. *Cochran*, at page 258, and *Northrop* v. *Hill*, at pages 354, 355.

The case of *United States* v. *Bunting et al.* (82 Fed. Rep., 883) involved an indictment under sections 5440 and 5418 of the Revised Statutes. The court said:

> When this case first came before me I was under the impression that the defendants were indicted under the old law, charged with conspiracy to defraud the United States, and as it was not shown that either of them had defrauded the Government of money or other property, I was in doubt whether the statute covered the charge. Since that time, however, I have carefully examined the bills of indictment, as well as the sections of the Revised Statutes under which the defendants are charged, and am of opinion that the offense comes within their terms.

> Section 5418 literally as well as in spirit, covers the case. The offense charged is a grave one—an attempt to prejudice the rights of the United States in the administration of the civil-service statutes. * * * The sections under which the defendants are indicted are broad and sweeping, and the offense, I think, is within their provisions.

In *United States* v. *Curley*, another civil-service case decided very recently (122 Fed. Rep., 738), the court sustained the Government's contention, and held as follows:

> Upon consideration of section 5418, and upon similar facts, this point was decided contrary to the defendants' contention in *United States* v. *Bunting* (D. C.), 82 Fed., 883. The point was also considered, though not decided, by the court of appeals of the District of Columbia in *Palmer* v. *Colladay*, June 18, 1901, reported in Washington Law Reporter, volume 29, No. 31, pages 532, 534, the opinion saying:
>
> "It is claimed by appellee that to defraud the United States must mean to deprive it of money wrongfully, or of something of money value, and that a falsehood or trick by which its officers are deceived in the matter of selecting those who are to perform work for it could not be fraud against the United States. We do not agree to this proposition."
>
> * * * * *
>
> The contention of the United States is that the word "defraud" not only signifies pecuniary fraud, but has the broad meaning of depriving another of a right by deception or artifice.

> The procuring by fraudulent representations of an appointment to office, or other action of the United States authorities, might involve no pecuniary loss to the United States, and yet involve a deprivation of right more serious than pecuniary loss.

Upon appeal (131 Fed. Rep., page 1) the circuit court of appeals said:

> The principal contention of the defendants here is that the word "defraud," in its ordinary common-law acceptation, has reference to property and property rights, and the case largely, and perhaps wholly, depends upon the sense in which the word "defraud" was used in the statute under consideration. Was it intended to limit the scope of the statute to frauds upon property and property rights of the Government, or was it intended to use the word in a broader sense, and for the protection of intangible rights, privileges, and functions of the Government?
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> * * * * *
>
> It is clearly enough within the power of the Federal Government to protect itself by proper legislation from crimes against its operations as well as from crimes against its existence.
>
> We now come to the main contention of the defense, * * * and * * * it will be seen that the question * * * is whether the allegations of the indictment, supported by the facts, constitute an offense, and justify conviction, and that question depends largely upon the sense in which the word "defraud" was

used in the sections of the statute under consideration.

* * * * *

A government does not exist in a personal sense, or as an entity in any primary sense, for the purpose of acquiring, protecting, and enjoying property. It exists primarily for the protection of the people in their individual rights, and it holds property not primarily for the enjoyment of property accumulations, but as an incident to the purpose for which it exists—that of serving the people and protecting them in their rights.

After discussing the matter as a moral offense, the court proceeds:

Under such an aspect it does not necessarily follow, as we have said, because the word "defraud" used in statutes for the protection of individual right will be construed as having reference to property interests, that the word "defraud" as used in a statute intended for the protection of a government and its wholesome administration of its affairs in the interests of the great body of the people has reference solely to property and pecuniary interests.

* * * * *

Moreover, when the word "defraud" is used in connection with the Government and the law itself, it naturally and necessarily has a broader and a different meaning than when used in connection with personal rights or in connection with individual rights of property. To illustrate, it is said in *The William King* (2 Wheat., 148, 153, 4 L. ed., 206) that "whatever is done in fraud of a law is done in violation of it."

Thereafter, at the present term, this court denied the defendants' application for *certiorari*.

In *Tyner et al.* v. *United States* (Washington Law Reporter, vol. 32, p. 258), involving two indictments under section 5440 of the Revised Statutes, the court of appeals of the District of Columbia sustained the indictments, saying (p. 264):

> The contention is that to defraud the United States means to deprive them of something of value—to do them a pecuniary injury. We have heretofore denied this restrictive meaning to those words. (*Palmer* v. *Colladay*, 18 App. D. C., 426, 433.)
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> * * * * *
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> The Post-Office Department is charged with performance of a great public service, in which the people of every State, Territory, and district are vitally interested.
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> * * * * *
>
> Any willful or corrupt misconduct on the part of an official of the Department that operates to impair this administration works a wrong to the United States and does them some substantial injury. The injury may be pecuniary—that is to say, one whereby public money or property may have been taken, destroyed, or expended—but it may also be one, the general damage resulting from which may be most serious and far-reaching, and yet not of a specific character susceptible of certain ascertainment and pecuniary compensation.

See authorities cited in Tyner case, and *People* v *Garnett* (35 Cal., 472, 473); *United States* v. *Watkins* (Fed. Cases, No. 16649, vol. 28, pp. 419, 425–426).

It has been held by this court in numerous cases that the procuring of patents from the United States for its public lands by fraudulent representations to the legally constituted authorities, or by concealing from such authorities facts which if known would have defeated the issuance of the patents, is a fraud upon the United States, and that it is the duty of the Government, upon discovery of the fraud, to institute judicial proceedings to vacate the patents, even though the Government itself may not have suffered any direct pecuniary loss, in all cases where to allow the patents to stand would work prejudice to the rights or interests of the Government in any manner, or would prevent it from fulfilling its obligation to the people to see that the law is so administered that the public lands may not be disposed of to parties not entitled to them. (*United States* v. *Beebe*, 127 U. S., 338, 342; *Colorado Coal Company* v. *United States*, 123 U. S., 307, 313).

It is true that in the latter case the court declined to set aside the patents, but this was upon the ground that the lands had passed into the hands of a *bona fide* purchaser for value without notice of the fraud. It was nevertheless declared that the proceedings were a fraud upon the United States because the patents had been obtained upon false proofs by persons not entitled to them; and this though the Government had sustained no pecuniary or property loss. The result was a *fraud* upon the *administration of the law*, and consequently a *fraud* upon the *United States*.

In *United States* v. *Trinidad Coal and Coking Company*, 137 U. S., 160, there was a scheme to obtain coal

lands in excess of the statutory maximum, contrary to law. The full price per acre was paid, however, by the company, and it was contended that the facts were not sufficient to justify the cancellation of the patents, no pecuniary loss to the Government having been alleged. Nevertheless the court said (pp. 166–167):

> This contention can not be sustained unless the court lends its aid to make successful a mere device to evade the statute. The policy adopted for disposing of the vacant coal lands of the United States should not be frustrated in this way.
>
> * * * * *
>
> There is, consequently, in view of the allegations of the bill, no escape from the concluclusion that the lands in question were fraudulently obtained from the United States. We say fraudulently obtained, because if the facts admitted by the demurrer had been set out in the papers filed in the Land Office, the patent sought to be canceled could not have been issued without violating the statute.

So there can be no question that any and all patents that may have been issued to defendants, or in their behalf, before their said conspiracy was discovered, in exchange for their said fraudulent State titles, were fraudulently obtained by defendants from the United States, because if the facts and circumstances set out in the indictment had been set out and disclosed in the selection papers filed in the Land Department, such patents could not have been issued otherwise than in violation of the law. Nor can there be any question

that as to the unpatented public lands involved in the conspiracy, to wit, the selected lands mentioned in the indictment, and other lands similarily situated, the Government, now having notice of the fraudulent character of the titles to the State school lands upon which the selections are based, could not issue patents upon such selections otherwise than in violation of the law.

Therefore, to obtain patents from the United States for its public lands by the means and in the manner set forth and charged in the indictment would be clearly a *fraud upon the United States*, notwithstanding the transaction might not involve any direct pecuniary or property loss to the Government. The result as well as the entire proceeding would be a fraud of the grossest character. The United States would be defrauded because it would be divested of title to its public lands contrary to law by means of false and fraudulent representations and concealment of facts which, if truthfully represented, would defeat the issue of the patents.

We do not contend that the acts of defendants in fraudulently acquiring school lands from the States of California and Oregon, alone considered, or if disconnected from any purpose on the part of the defendants to exchange the lands so acquired, for public lands of the United States, would constitute an offense against the United States, but we do contend that those acts constitute *one of the links in the chain* of which the conspiracy to defraud the United States is composed, and

that the sole purpose of those acts was to enable the defendants to procure from the United States patents for its public lands. The school lands were acquired from said States for that purpose, and that purpose only. It is elementary law that if one necessary link in the chain of means to accomplish a fraud be composed of deceptive practices, those deceptive practices are as effective to constitute the offense as if every link in the chain had been forged by like deception, and that the deceitful practices used in obtaining one of the means of effecting the fraud, infect the whole transaction. By tendering to the United States, in exchange for its public lands, the titles obtained by fraudulent practices from the States of California and Oregon *for the sole purpose of making such exchange*, the defendants have been guilty of an attempt to defraud the United States.

Moreover, the same act or series of acts may constitute an offense equally against the United States and against the State, and subject the guilty party to punishment under the law of each government.

In *United States* v. *Marigold*, 9 How., 560, 569, this court said that—

> * * * the same act might, as to its character and tendencies, and the consequences it involved, constitute an offense against both the State and Federal governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each.

Cross v. *North Carolina*, 132 U. S., 131; *Fox* v. *Ohio*, 5 How., 410, 433; *Moore* v. *Illinois*, 14 How., 13, 19; *Ex parte Siebold*, 100 U. S., 371, 390, are clear to the same effect.

So in the case at bar, the fact that in order to perpetrate their fraud upon the United States the defendants first committed a fraud upon the States of California and Oregon as one link in the chain forged to effectuate the fraud against the United States, and the fact that each of those States might punish the defendants for their crime in forging that link, can not affect the right of the United States Government to punish the defendants for their crime against it.

As has been already stated, the indictment charges that the object of the conspiracy was to defraud the United States out of the *possession and use* of its public lands as well as out of the title to such lands; and what has been said on this subject upon another branch of the discussion is applicable also here. Under the rulings and decisions of the Land Department, as well as under the decisions of this court, one who accepts the Government's offer to exchange lands under the act of 1897 becomes vested with the equitable title to the public lands which he selects, as soon as he has complied with all the requirements necessary to entitle him to a United States patent therefor and has secured the approval of his selection by the Land Department. *Kern Oil Company et al.* v. *Clarke* (30 Land Decisions, 550, 556); same case on review (31 Land Decisions, 288, 289–290); *Kern Oil Company* v. *Clotfelter* (30 Land

Decisions, 583, 585); *Cosmos Co.* v. *Gray Eagle Co.* (190 U. S., 301, 312–313. See also as to point of time when equitable interest vests in party seeking to acquire patent to public lands, *Carroll* v. *Safford*, 3 How., 441, 446; *Witherspoon* v. *Duncan*, 4 Wall., 210, 218; *Stark* v. *Starrs et al.*, 6 Wall., 402; *Barney* v. *Dolph*, 97 U. S., 652, 656; *Wirth* v. *Branson*, 98 U. S., 118, 121; *Simmons* v. *Wagner*, 101 U. S., 260–261; *Benson Mining and Smelting Company* v. *Alta Mining and Smelting Company*, 145 U. S., 428.

The selections directly involved in the indictment, which are all unpatented, embrace about 20,000 acres of the public lands. Most of the selections were filed several years prior to the finding of the indictment. They are accompanied by apparently genuine proofs which upon their face indicate that all requirements of the law have been complied with. By this means, and by the bribery of certain officials of the Land Department, as also charged in the indictment, the defendants would secure the early approval of their selections, which approval would give them the apparent right to the possession of the selected lands. They would thus obtain possession of the public lands of the United States in large quantities, and under color or claim of right thereto by virtue of the approval of their fraudulent selections, would appropriate the lands and, in many instances the timber thereon, to their own use and benefit against the interests of the United States. They would also take possession of selected lands prior to the approval of the selections, under the pre-

tense of having filed proofs showing compliance with all the requirements of the law, and would appropriate such lands in the like manner.

By these means the Government would be actually defrauded out of the possession and use of the selected lands, and also, in many instances, out of valuable timber belonging to it. The extent of the Government's loss in this respect can only be shown by the proof to be adduced at the trial.

The rule of *bona fide* purchaser is the creation of courts of equity, and is enforced solely for the purpose of protecting that one of two innocent parties who is least to blame when one of them must suffer loss. It is never enforced for the protection of a guilty person. The rule was not adopted by equity for the protection of cheats, frauds, or swindlers. As to all such persons the rule is that no man shall be permitted to profit by his own wrong.

As is well said in the case of *Riggs* v. *Palmer et al.* (115 N. Y., 506):

> All laws as well as all contracts may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are dictated by public policy, and have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes.

If the contention of defendants were sustained, it would be the duty of the United States to plead the equitable defense of *bona fide* purchaser against the States of California and Oregon, and thus become an accessory after the fact to the frauds committed by defendants upon those States, and thereby aid defendants to complete the fraud upon those States. We deny that any such obligation rests upon the United States. At all events, the defendants can not take advantage of their own wrong, or escape the consequences thereof, in this way. It does not lie in their mouths to insist that the United States shall plead this defense and thus aid them to complete their frauds against the States. Moreover, in this respect, the Government occupies a different position from that of an individual who, without actual or constructive notice, purchases from another lands covered by a fraudulent and defective title. The Government is an interested party, not only to see that it secures a good title to lands relinquished to it, but also to see that the law providing for the exchange is properly administered, and that no person is allowed to obtain public lands thereunder who is not entitled to the same. In other words, the Government holds the public lands in trust for the benefit of the people of the United States, and is obliged to see that such trust is honestly administered, and that no part of the public lands is disposed of to scheming land speculators, or to other persons, contrary to or in violation of its own laws. As was said by this court in *United States* v. *Beebe* (127 U. S., 338, 342):

> The public domain is held by the Government as part of its trust. The Government is charged with the duty and clothed with the power to protect it from trespass and unlawful appropriation, and under certain circumstances, to invest the individual citizen with the sole possession of the title which had till then been common to all the people as the beneficiaries of the trust.

But the lands involved in the indictment have not been patented, and therefore the principle contended for by defendants could have no application in the case at bar, even if it were sound. It will hardly be contended that the Government, now having notice of the fraudulent character of the titles relinquished to it in exchange for the selected lands mentioned in the indictment, should nevertheless issue its patents for such selected lands. The bare statement of such a proposition carries its own refutation. If the Government were to issue such patents it could never in any event successfully interpose the defense of *bona fide* purchaser. And, as suggested in the opinion of the circuit court, no officer of the Government, while in possession of his senses, would issue such patents and thus carry out the fraud. To protect itself, the Government is obliged to cancel all unpatented selections based upon such fraudulent titles. How can it be said, therefore, that the transaction is not an attempted fraud upon the United States?

Fourth. A further element of the conspiracy is that defendants were, by *bribery*, to induce certain United

States officials in the General Land Office at Washington, in the District of Columbia, corruptly and contrary to their official duties, to aid defendants to secure the approval of their fraudulent selections, *in advance of their regular order*, and to inform defendants of any discovery or investigation by the Government of their said fraudulent practice; and also, by like means, to induce certain United States forest-reserve officials, corruptly and contrary to their official duties, to aid defendants to secure new forest reserves to be established in the States of California and Oregon, in such localities as to embrace undisposed-of school lands of said States, respectively, and in such manner as would best serve the interests of defendants in effecting the object of their conspiracy, and to secure the extension or reduction of forest reserves already established in said States, in such manner as would be to the like interests of defendants.

These elements of the conspiracy are embraced in the indictment, as will be seen from the printed records (pp. 15 and 16 in Hyde's case, and pp. 18 and 19 in Dimond's case). See also pages 86–89 of the appendix to this brief.

That any willful or corrupt misconduct on the part of officials of the Government that operates to prevent the due and proper administration of its laws is a fraud upon the Government, and does it a substantial injury, is fully shown by the authorities already cited in this brief. It must necessarily follow, therefore, that a conspiracy to bring about such misconduct in office is

an offense within the meaning of the statute under consideration, which condemns conspiracies to *defraud* the Government in *any* manner *or* for *any* purpose. It is difficult to conceive how the functions of the Government could be more seriously impaired than by corrupting the officers charged with the duty of administering its laws. In this case the purpose of the legislation providing for the establishment and maintenance of forest reserves has been practically thwarted, as to the States of California and Oregon, and the law has been so perverted in its administration as not only to defeat the object had in view but effectively to subserve the unlawful and fraudulent purposes of defendants.

Moreover, it would seem to be settled that the common law as to crimes and offenses is in full force and vigor in the District of Columbia, and the acts of such United States officials which defendants conspired to corruptly induce, as stated in the indictment, would, if performed, constitute "misconduct in office" on the part of such officials, and such misconduct was an indictable offense at common law.

This view is sustained by *United States* v. *Watkins* (case No. 16649, 28 Fed. Cas., pp. 419, 425), decided by the circuit court for the District of Columbia in 1829, which held that—

> All the power which Maryland had, by virtue of that common-law prerogative, to punish, by indictment, offenders against her sovereignty, and to protect that sovereignty, became vested in the United States; and authorized them to

> punish offenders against their sovereignty, and to protect that sovereignty by the same means, so far as regarded the territory ceded. We therefore think that, in regard to offenses committed within this part of the District, the United States have a criminal common law, and that this court has a criminal common-law jurisdiction.

United States v. *Tyner and Barrett* (*ut supra*) discussed this question as follows:

> * * * There is, however, no statute of the United States creating the offense of official misconduct, wherefore it is contended that the indictment is fatally defective, because there are no common-law offenses against the United States. (*United States* v. *Eaton*, 144 U. S., 677, and cases cited.) Undoubtedly this is the general rule, but it does not apply in the District of Columbia. (*De Forrest* v. *United States*, 11 App. D. C., 458, 465.)
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> * * * * *
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> The common law being in force in the District of Columbia when section 5440, Revised Statutes, was enacted, any common-law offense not repealed, superseded, or plainly inconsistent with existing legislation or necessarily obsolete, must be held to be an offense against the United States within the meaning of that section.

Therefore, if "misconduct in office" within the District of Columbia is a crime against the United States, there can be no question that a conspiracy to induce the commission of such a crime would be a conspiracy "to commit an offense against the United States," and

likewise a conspiracy "to defraud the United States" within the meaning of section 5440 of the Revised Statutes. All crimes against the United States are in themselves necessarily frauds upon the United States.

It is insisted by appellants that the indictment is fatally defective because certain of its allegations relating to the means whereby the objects of the conspiracy were to be effected are in the alternative, and in the disjunctive, and are repugnant, and that the indictment is therefore uncertain because not alleging specifically that the school lands mentioned in the several counts, respectively, were to be obtained from the States of California and Oregon by any *one* of the means mentioned.

This is a question which can not be determined upon *habeas corpus* proceedings, and must be left for determination by the court in which the indictment was found. The Government's position, however, is this: A mere reading of the indictment will show that the allegations complained of are not in the alternative or disjunctive, but are in the *conjunctive*. The allegations are that school lands were to be obtained from said States, by and on behalf of defendants, in the fraudulent manner set forth, (1) "in the names of fictitious persons," *and* (2) "in the names of persons not really desiring, and not qualified, to purchase the same."

The suggestion is that a purchase from the State could not be both in the name of a fictitious person and in the name of a real person, and that for this

reason the allegations are repugnant. But the allegations are parts of the general description of the conspiracy charged in the indictment and are not repugnant. They refer to large tracts of lands, and while one piece of land, supposing it to contain only a single legal subdivision of the smallest area recognized by the United States system of public-land surveys, could not be obtained in both ways, perhaps, the facts are that the conspiracy embraced both ways, and that the State lands mentioned in some of the counts of the indictment were obtained in both ways; that is, portions of the lands were obtained in the names of fictitious persons, and other portions in the names of real persons not qualified to purchase, and all used as base for the same selection of public lands outside of forest reserves. The fraudulent practice whereby the State lands were to be obtained and which formed a part of the general conspiracy, embodied both the methods named. The conspiracy could not be properly described in any other manner than as set out in the indictment, because both the methods were to be and were resorted to, both being parts of the general scheme. Any overt act in the prosecution of the scheme would be an act in furtherance of the conspiracy as a whole, no matter whether it related to only one or to both of the methods whereby the State lands were to be acquired. An act done in the prosecution of either method would be an act done to effect the object of the general conspiracy. To hold the indictment repugnant and in-

sufficient for uncertainty, because of the reasons stated, would be in effect to hold that no combination or conspiracy intended to embrace several different means for its accomplishment, and which might be accomplished by the use of one only of the several means, would be an offense under the statute. Such can not be the law.

The specific charge is made, in connection with the overt act in the first count of the indictment, that the purpose was to defraud the United States out of certain public lands described in that count, 3,400 acres in all, by exchanging for them 3,400 acres of school lands obtained by defendants from the States of California and Oregon, in pursuance of the fraudulent practice—embracing both methods—set out in the indictment. It may be literally true that these State lands were obtained by the use of both methods—that is, some by the use of one method and some by the use of the other method: but this can make no difference and can furnish no valid objection to the indictment. If anything is lacking it is that the defendants are not specifically informed which of the State lands were obtained in one way and which in the other, supposing they were obtained in both ways. But there is no repugnancy in all this. At most it could only be said that the indictment is not "certain to every intent and particular" as to this part of it.

But, it seems to be settled law that in indictments for conspiracy the same certainty of statement is not required as in other cases.

In *United States* v. *Stevens et al.*, 44 Fed. Rep., 132, 141, the court said:

> * * * in stating the object of the conspiracy, the same certainty and strictness are not required as in the indictment for the offense conspired to be committed. Certainty to a common intent sufficient to identify the offense which the defendants conspired to commit is all that is required. When the allegation in the indictment advises the defendants fairly what act is charged as the crime which was agreed to be committed, the chief purpose of pleading is attained. Enough is then set forth to apprise the defendants so that they may make a defense.

See on the same subject *Archbold's Crim. Pl., ed. 1900*, page 1213; *Peters* v. *United States*, 94 Fed. Rep., 127; *Dealy* v. *United States*, 152 U. S., 539, 543–544.

Can it be doubted that if defendants entered into a conspiracy to defraud the United States of its public lands by the means and in the manner alleged in the indictment, and an act were done to effect the object of the conspiracy, which did not relate to either of the methods suggested for acquiring the State school lands, the crime of conspiracy would be complete? And would not the result be the same if the overt act related to one and not to the other of the methods of acquiring the State lands, or if it related to and embraced both the methods?

It is enough that the purpose of the defendants and their conspiracy had in view the acquiring of public lands of the United States by the use of the several

methods mentioned in the indictment; and it is not essential to the crime that the minds of the conspirators should have settled upon either one of the methods to be used in bringing about the exchange as to any particular tract or portion of the public lands. It is not necessary that an overt act should be alleged as to every element of the conspiracy, or that an overt act must be alleged as specifically referable to any particular element of the conspiracy. It is sufficient that the overt act relied on be an act done to effect the object of the conspiracy as generally described. It may be, in fact, referable to only one of several parts of the conspiracy, and yet, if done in the prosecution of such part, it is properly alleged as an act done to effect the object of the conspiracy as a whole.

The overt acts here relied on are alleged to have been done to effect the object of the conspiracy, as generally described, and they are none the less effective for that purpose because not alleged as referable severally to one or the other of the two methods whereby the State lands were to be acquired.

It is worthy of note in this connection that in *Dealy* v. *United States* (*supra*) the alleged fraudulent means for acquiring public lands of the United States under the conspiracy charged in that case embraced both *false* or *feigned* entries and *fictitious* entries. There was no averment as to what lands were to be included in the false or feigned entries, or as to what lands were to be included in the fictitious entries. And yet the indictment was sustained by this court.

The other counts in the indictment in the case at bar are in the same form as the first, except that they refer to the first for a general description of the several conspiracies. Each count charges a separate conspiracy, and the defendants might be found guilty on one or more of the counts and not guilty as to other counts. A reference to the indictment as a whole would make the full record of the offense for which the conviction was had, and would be ample protection to the defendants as against other prosecutions. (See *Blitz* v. *United States*, 153 U. S., 108; *Peters* v. *United States*, 94 Fed. Rep., 127; Wharton's Criminal Law, 154; and Chitty's Criminal Law, 250.)

But should the indictment be considered too general, as to this or any other charge, a bill of particulars at the trial would supply all the necessary details. In Wharton's Criminal Practice (sec. 702) it is said:

> Whenever the indictment is so general as to give the defendant inadequate notice of the charge he is expected to meet, the court, on his application, will require the prosecution to furnish him with a bill of particulars of the evidence intended to be relied on. That indictments may be thus general, and yet in entire conformity with precedents, has been heretofore abundantly shown.

See also *Durland* v. *United States*, 161 U. S., 306, 315; *Rosen* v. *United States*, 161 U. S., 29; *Tubbs* v. *United States*, 105 Fed. Rep., 59, 61; *McKnight* v. *United States*, 97 Fed. Rep., 208, 213.

III.

Does section 1014 of the Revised Statutes authorize the removal from a judicial district to the District of Columbia, for trial, of a person indicted for an offense committed in the District of Columbia?

It is contended that the provisions of section 1014 of the Revised Statutes are limited to the removal of persons from one *judicial* district of the United States to another *judicial* district, and do not contemplate the removal of a person from a State or *judicial* district to the District of Columbia. Said section is as follows:

> SEC. 1014. For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such States, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is

> imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had.

Provision is here made that an offender against the United States may be arrested in any State where he may be found, and imprisoned or bailed, as the case may be, "for trial before such court of the United States as by law has cognizance of the offense;" and that when imprisoned (in default of bail) in a district other than the one in which the offense is to be tried, he shall be, by order of the judge of such district, removed to the district where the trial is to be had. It is insisted that the District of Columbia is not a *judicial* district technically speaking, and therefore is not a "district" within the meaning of said section 1014. This seems to be a mere play upon words and does not reach the real meaning of the statute. The important and controlling provision is that the offender shall be arrested and imprisoned, if not bailed, "for trial before such court of the United States as by law has cognizance of the offense." The later provision of the section is intended to prescribe and does prescribe the means whereby the offender, in default of bail, is to be removed to the jurisdiction where the trial is to be had—that is, to the jurisdiction of the court of the United States which "by law has cognizance of the offense." The word "district" is clearly used in the sense of denoting the *jurisdiction or place of trial*, rather than in the narrow technical sense here contended for.

Congress has declared the supreme court of the District of Columbia to be "a court of the United States,"

and has directed that crimes committed in the District of Columbia shall be tried in such court. (See sections 61 and 83 of the new code of the District of Columbia, quoted in another part of this brief.) Clearly, therefore, the supreme court of the District of Columbia is, within the meaning of said section 1014, "such court of the United States as by law has cognizance of the offense" charged in this indictment.

The courts of general jurisdiction in the District of Columbia have always been regarded and treated as courts of the United States, even prior to the enactment of the new code of the District. In the recent case of *Moss* v. *United States* (Wash. Law Rep., vol. 32, pp. 342–343) the court of appeals of the District of Columbia, after reviewing the provisions of the Constitution and the statutes, said:

> The courts of general jurisdiction of the District of Columbia are certainly not mere municipal courts; and they have always been distinguished from mere Territorial courts, created for a temporary purpose, and the judges of which may be appointed for a limited time, subject to removal by the President. Indeed, the courts of general jurisdiction of this District have been treated and regarded, from the time of their first creation and establishment down to the present time, as courts of the United States; and it is difficult to perceive how they could be otherwise designated. They have been so declared by the Supreme Court of the United States upon more than one occasion. (*Embry* v. *Palmer*, 107 U. S., 3, 9, 10; *Phillips* v. *Negley*, 117 U. S., 665, 674–675.)

In *Embry* v. *Palmer* this court said:

> That the supreme court of the District of Columbia is a court of the United States, results from the right of exclusive legislation over the District which the Constitution has given to Congress.

It thus appears that the supreme court of the District of Columbia has been declared to be a court of the United States, both by this court and by the court of appeals of the District, and also by act of Congress.

By section 1, chapter 39, Compiled Statutes of the District of Columbia (1894, p. 337), it is provided that—

> The Constitution and all the laws of the United States, which are not locally inapplicable, shall have the same force and effect within the District as elsewhere within the United States.

And by section 24, chapter 35, Compiled Statutes of the District of Columbia (p. 296), it is provided that—

> The provisions of the thirty-third section of the judiciary act of seventeen hundred and eighty-nine shall apply to courts created by act of Congress in the District of Columbia.

Among the provisions of the judiciary act here referred to are those contained in said section 1014 of the Revised Statutes.

By section 1 of the new code of the District of Columbia it is declared that—

> * * * all general acts of Congress not locally inapplicable in the District of Columbia, and all

> acts of Congress by their terms applicable to the District of Columbia and to other places under the jurisdiction of the United States, in force at the date of the passage of this act shall remain in force except in so far as the same are inconsistent with, or are replaced by, some provision of this code.

In view of this legislation, we submit there can be no doubt that section 1014 applies to the District of Columbia as well as to other parts of the United States. It is a general law of the United States, not locally inapplicable in the District of Columbia, and was, by section 24, chapter 35, of the Compiled Statutes of said District, specially declared to apply to courts created by act of Congress in the District; which said section 24 has not been "replaced" by any provision of the new code of the District, and is therefore still in force.

In the case of *United States* v. *Haskins* (3 Sawyer, 262; Federal Cases, vol. 26, No. 15322), the United States district court of California held that for an offense against the United States, committed in the Territory of Utah, the offender may be arrested in any district of the United States and removed to the Territory for trial if the Territorial courts have cognizance of the offense, and that the Territorial courts are "courts of the United States," as that designation is applied in section 33 of the judiciary act (to wit, section 1014 of the Revised Statutes).

In the case of *Burton* v. *United States* (not yet reported), it seems to have been taken for granted by

this court that the term "district" as used in the provision of Article VI of the amendments to the Constitution of the United States entitling a party to be tried by a jury of the State and district in which the crime charged against him was committed, and as used in section 731 of the Revised Statutes providing that offenses begun in one "judicial circuit" (meaning judicial district, *Horner* v. *United States*, 143 U. S., 207, 212), and completed in another, may be tried and punished in either district, was intended to embrace the District of Columbia as well as other districts of the United States; or at least, that in determining matters of venue in criminal cases, the term "district" is applicable interchangeably to the District of Columbia and other districts of the United States.

It is an established rule of statutory construction that all laws must be construed, if possible, to prevent absurd or mischievous results. (Maxwell on Interpretation of Statutes, 179; Sutherland on Statutory Construction, secs. 323, 324; *Lau Ow Bew* v. *United States*, 144 U. S., 47, 59, and cas. cit.) The construction here contended for by the defense, if adopted, would be both absurd and mischievous. The result would be that all offenders against the laws of the United States in the District of Columbia could secure absolute immunity from punishment for their crimes, however infamous or prejudicial to the public welfare, simply by departing and remaining without the bounds of the District. It would make the whole United States outside the District of Columbia an asylum for

fugitives from the administration of justice within the District. This should be a sufficient reason for rejecting the construction, if there were no other.

It is submitted that the decision of the circuit court in each case, dismissing the petition and denying the application for writs of *habeas corpus* and *certiorari*, should be affirmed.

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APPENDIX.

For convenience of reference, that part of the first count of the indictment which contains a general description of the conspiracy is here given, followed by a brief analysis thereof showing the several elements or constituent parts of the conspiracy:

The grand jurors for the United States of America, inquiring for the District of Columbia, upon their oath present, that on the twenty-fourth day of October, in the year of our Lord nineteen hundred and one, and from thence until the first day of February, in the year of our Lord nineteen hundred and four, Frederick A. Hyde and John A. Benson were engaged, at the city of San Francisco, in the State of California, for their own profit, gain, use and benefit respectively, in the business of obtaining from the said United States and appropriating, in the manner hereinafter set forth, the possession and use of and title to public lands of the said United States outside of forest reserves established under the laws of the said United States, in exchange for and in lieu of lands lying within such forest reserves and known as school lands, by them the said Frederick A. Hyde and John A. Benson obtained from the States of California and Oregon in the manner hereinafter set forth; that Henry P. Dimond was, during the said period, an employee, agent and attorney for hire of the said Frederick A. Hyde and John A. Benson in the matter of their said business; that Joost H. Schneider was, during the said period, an agent and employee for hire of the said Frederick A. Hyde and John A. Benson in the matter of their said business; that

Woodford D. Harlan and William E. Valk were, before and during the said period, employees of the said United States holding official positions in the General Land Office of the said United States at the city of Washington, in the said District of Columbia, and as such employees were paid fixed salaries respectively and were respectively charged with duties pertaining to the disposal of the public lands of the said United States, and especially to the exchanging of such public lands, lying outside of forest reserves established, under the laws of the said United States in that behalf, and open to selection under the said laws, in exchange for and in lieu of lands within such forest reserves; that Benjamin F. Allen was, before and during the said period, an employee of the said United States in the public-land service, that is to say, a forest superintendent; and that Grant I. Taggart was, before and during the same period, an employee of the said United States in the said public-land service, that is to say, a forest supervisor.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that the said Frederick A. Hyde, John A. Benson, Henry P. Dimond and Joost H. Schneider, during the period aforesaid, to wit, on the thirtieth day of December, in the year of our Lord nineteen hundred and one, at Washington aforesaid, in the said District of Columbia, unlawfully did conspire, combine, confederate and agree together, and with divers other persons to the said grand jurors unknown, knowingly, wickedly and corruptly to defraud the said United States out of the possession and use of, and the title to, divers large tracts of the public lands of the said United States open and to be open to selection, under the laws of the said United States in that behalf, in lieu of lands included and to be included within the limits of forest reserves, established and to be established as aforesaid in the said States of California and Oregon, by obtaining, for the profit, gain, use and benefit of themselves, as in this count of this indictment hereafter set forth, from the said United

States, and appropriating, such possession, use and title, in pursuance and by means of a false and fraudulent practice whereby the said Frederick A. Hyde and John A. Benson were to obtain fraudulently from the said States of California and Oregon title to and possession of school lands lying within the limits of such forest reserves and open to purchase from those States, by residents thereof respectively, (being citizens of the said United States or persons having declared their intention to become such,) under the laws thereof respectively, in quantities not exceeding, for each of such residents, six hundred and forty acres in the said State of California and three hundred and twenty acres in the said State of Oregon, upon application being made to the proper authorities of the said States respectively, by any such resident, supported by his affidavit, showing his qualifications to make such purchase, and, amongst other things (as before and during the said period was required by the laws of the said States), his intention to purchase such lands in good faith and for his own benefit, and that he has made no contract or agreement to sell the same,—which said school lands were to be so obtained from the said States by making and filing with the said authorities applications for the purchase of the same, and assignments of the same, and of the certificates of purchase thereof, in the names of fictitious persons, and in the names of persons not really desiring, and not qualified, to purchase the same, (the use of which last-mentioned names for such purposes the said Frederick A. Hyde and John A. Benson would procure by paying and causing to be paid to such persons respectively small sums of money, and by falsely representing and causing to be represented to some of such persons that they were merely disposing of their respective rights to purchase such school lands),—and by supporting such applications with forged and fraudulent affidavits and affidavits false, and known to the said Frederick A. Hyde and John A. Benson to be false, in this, that they would purport to be, some the affi-

davits of real persons, and others the *bona fide* sworn affidavits of the persons whose names were signed thereto, whereas in truth and in fact the former would be the affidavits of fictitious persons and would not be the affidavits of real persons or affidavits sworn to by any person, and the latter would not be the *bona fide* or sworn affidavits of the persons whose names were signed thereto, because such latter affidavits would not only state that the affiants therein were persons qualified under the laws of the said State of California, or of the said State of Oregon, as the case might be, to make such applications and to purchase such lands, by reason, amongst other things, of their intending to purchase the same in good faith and for their own benefit respectively, and of their having made no contract or agreement to sell the same, while in truth and in fact none of such real persons would intend to purchase such lands in good faith for his own use or benefit at all, but would be either knowingly aiding and assisting the said Frederick A. Hyde and John A. Benson in their said fraudulent practice or innocently acting upon their said false representations, but because, also, the said latter affidavits would not in truth and in fact have ever been sworn to at all by any of the persons whose names were signed thereto; and whereby the said Frederick A. Hyde and John A. Benson were to cause to be relinquished, assigned, transferred and conveyed, by means of false and forged relinquishments, assignments and conveyances, to the said United States, either directly, or indirectly either through the said Frederick A. Hyde, or through divers agents and attorneys of the said Frederick A. Hyde and John A. Benson, to wit, Crawford W. Clarke, A. S. Baldwin, Isaac Liebes, Elizabeth Dimond, and others whose names are to the said grand jurors unknown, as would be found convenient or necessary, the pretended rights of such fictitious persons respectively, and require and procure such real persons to make relinquishments, assignments, transfers and conveyances, either directly, or indirectly through

the said Frederick A. Hyde, or through the said agents and attorneys of the said Frederick A. Hyde and John A. Benson, as would be found convenient or necessary, to the said United States, of the titles to and possession of such school lands so by the use of the names of such real persons fraudulently to be obtained from the said States, and this, in either case, in exchange as aforesaid for public lands to be selected, and for titles thereto by patent to be obtained, by and on behalf of the said Frederick A. Hyde and John A. Benson in the names of such fictitious or real persons, or in the names of the said Frederick A Hyde, (under the designation of F. A. Hyde,) Crawford W. Clarke, (under the designation of C. W. Clarke,) A. S. Baldwin, or Isaac Liebes, or under the name of Elizabeth Dimond, or of F. A. Hyde & Co., as would be found convenient or necessary, from the public lands of the said United States, in lieu of such school lands lying within the limits of such forest reserves as aforesaid; and whereby the said Frederick A. Hyde and John A. Benson were in like manner to exchange such school lands already, before the said period, obtained by them from the said States in the same fraudulent manner, for public lands of the said United States lying outside of the limits of forest reserves and open to selection as aforesaid, and for titles by patent thereto as aforesaid,—they the said Frederick A. Hyde and John A. Benson, when so as aforesaid causing to be relinquished, assigned, transferred and conveyed to the said United States the titles to and exchanging the school lands, so by either of the methods aforesaid fraudulently obtained and to be obtained from the said States, for public lands of the said United States as aforesaid, and for titles by patent thereto, well knowing such titles to such school lands to be, as they were and would be, false, fraudulent, fictitious, void and worthless, and the possession acquired thereunder unlawful, and intending thereby, and by afterwards selling and disposing of such public lands and patent titles to the general public, to defraud the said United

States out of the possession and use of, and of the title to, the public lands so to be selected, obtained and appropriated in lieu of such school lands as aforesaid, to the profit, gain, use and benefit of themselves as aforesaid; and whereby the said Frederick A. Hyde and John A. Benson were, during the said period, to induce and procure, and take advantage of the fact that they had before the said period induced and procured, the said Woodford D. Harlan and William E. Valk, by paying to them respectively divers large sums of money for that purpose, corruptly to furnish to the said Frederick A. Hyde and John A. Benson information concerning the status in the said General Land Office of all matters pertaining to their said business, and especially to their selections of public lands of the said United States based upon the false, fraudulent, fictitious, void and worthless titles to lands obtained by them in the manner aforesaid from the said States of California and Oregon, and to be exchanged for such public lands as aforesaid, and to expedite, contrary to their duty as such employees of the said United States, the matters which should be pending in the said General Land Office pertaining to the said business and to the examination of such selections, made and to be made by and on behalf of the said Frederick A. Hyde and John A. Benson as aforesaid, by securing the approval thereof in advance of the time when in the due course of business they would be approved by the proper officers of the said General Land Office, and otherwise favoring and assisting the said Frederick A. Hyde and John A. Benson in their said business and fraudulent practice in that behalf in every way in their power; and whereby the said Frederick A. Hyde and John A. Benson were, during the said period, in like manner to induce and procure the said Woodford D. Harlan and William E. Valk corruptly to furnish to them the said Frederick A. Hyde and John A. Benson information concerning any discovery or investigation of the said fraudulent practice of them the said Frederick A. Hyde and

John A. Benson by the officials of the Department of the Interior of the said United States or of the said General Land Office, to the end that the said Frederick A. Hyde and John A. Benson might be enabled to defeat the object of such investigation; and whereby, also, the said Frederick A. Hyde and John A. Benson were, during the said period, to induce and procure, and take advantage of the fact that they had before the said period induced and procured, the said Benjamin F. Allen and Grant I. Taggart, forest superintendent and forest supervisor respectively as aforesaid, by paying and giving to them respectively sums of money and other valuable consideration, for that purpose, (notwithstanding it was, before and during the period aforesaid, the duty of each of them, as such forest superintendent and forest supervisor respectively, under the laws of the said United States pertaining thereto and under the rules, regulations and instructions, general and special, of the said Department of the Interior, to furnish to, and only to, their superior officers respectively in the said Department of the Interior and in the said General Land Office all information gathered by them in their official capacity, and themselves to make and transmit to their said superior officers respectively, for the consideration of those officers in determining the advisability of including, or not including, public lands of the said United States within, or excluding the same from, forest reserves of the said United States, true and accurate official reports and recommendations, based upon their own official investigations and knowledge respectively, concerning the character and condition of such of the public lands of the said United States as might come under their official supervision respectively, and concerning the advisability of including, or not including, such lands within, or excluding the same from, such forest reserves,) corruptly and contrary to their said duty to furnish to the said Frederick A. Hyde and John A. Benson all information gathered by them in their said official capacity respectively, and allow the said Fred-

erick A. Hyde and John A. Benson to prepare and make for them the said Benjamin F. Allen and Grant I. Taggart respectively, and in their respective names as such forest superintendent and forest supervisor, divers of such official reports and recommendations concerning the character and condition of such of the public lands of the said United States as had and should come under the official supervision of them the said Benjamin F. Allen and Grant I. Taggart as aforesaid, and in favor of including, or not including, such lands within such forest reserves, or excluding the same therefrom, as should be to the interest of them the said Frederick A. Hyde and John A. Benson in the premises, and to transmit the reports and recommendations so prepared and made by the said Frederick A. Hyde and John A. Benson to their said superior officers,—it being, as the grand jurors aforesaid, upon their oath aforesaid, charge the fact to be, a part of the said unlawful conspiracy, combination, confederation and agreement of them the said Frederick A. Hyde, John A. Benson, Henry P. Dimond and Joost H. Schneider to secure, by this and other means too numerous and diverse to be here described, the establishment of forest reserves under the laws of the said United States in such localities in the said States of California and Oregon as would, by reason of the fact that large quantities of the school lands aforesaid in such localities were still undisposed of by, and open to purchase from, the said States respectively, best effect the object of the said unlawful conspiracy, combination, confederation and agreement; and whereby the said Henry P. Dimond, as employee, agent and attorney for the said Frederick A. Hyde and John A. Benson as aforesaid, for money and other valuable consideration, to be paid to him by the said Frederick A. Hyde and John A. Benson on that account, was in that capacity to aid and assist the said Frederick A. Hyde and John A. Benson in their said business, by appearing in their behalf before the proper officers of the said Department of the In-

terior and of the said General Land Office, at Washington aforesaid, and from time to time urging speedy action by those officers upon the matters there pending pertaining to the said business, and otherwise furthering the said business of the said Frederick A. Hyde and John A. Benson in the divers ways hereafter in this indictment shown,—he the said Henry P. Dimond, when so aiding and assisting the said Frederick A. Hyde and John A. Benson in their said business, well knowing the fraudulent character of that business and of the matters pertaining thereto under his supervision as such employee, agent and attorney, and that his acts as such employee, agent and attorney in so aiding and assisting the said Frederick A. Hyde and John A. Benson in their said business, were done in pursuance and to effect the object of the said unlawful conspiracy, combination, confederation and agreement; and whereby the said Joost H. Schneider was, in the capacity of their employee for hire, to aid and assist the said Frederick A. Hyde and John A. Benson in obtaining from the said States of California and Oregon the false, fraudulent, fictitious, void and worthless titles to and unlawful possession of the school lands aforesaid, in the manner aforesaid, by negotiating, in behalf of the said Frederick A. Hyde and John A. Benson, with the persons willing to sell and allow the use of their names for the purpose of making applications to purchase such school lands as aforesaid, and for making affidavits in support of such applications, and for relinquishing, transferring and conveying the said school lands to the said United States as aforesaid, and by making to other persons, in behalf of the said Frederick A. Hyde and John A. Benson, the false represenations aforesaid as to the character and effect of the documents to be signed by them respectively, and so procuring the use of the names of all of such persons for the purposes aforesaid, and also by forging, and procuring to be forged, the necessary documents for securing the titles to such lands from the

said States in the names of fictitious persons, and for relinquishing, transferring and conveying the same to the said United States as aforesaid,—he the said Joost H. Schneider, when so aiding and assisting the said Frederick A. Hyde and John A. Benson in the manner aforesaid, well knowing the fraudulent character of such applications, affidavits, relinquishments, transfers, assignments and conveyances, and that they were to be made and used for the purposes aforesaid.

ANALYSIS OF INDICTMENT.

It will be observed that the conspiracy charged in the indictment embraces the false and fraudulent practice by defendants whereby school lands were to be obtained, fraudulently, from the States of California and Oregon, by and on behalf of Frederick A. Hyde and John A. Benson, (1) in the names of *fictitious* persons and (2) in the names of persons *not qualified to purchase* the same, and whereby the said Hyde and Benson were to cause and require such school lands to be relinquished, assigned, transferred and conveyed, by means of false and forged relinquishments, assignments and conveyances, to the United States, in exchange for public lands to be selected, and for titles thereto by patent to be obtained, by and on behalf of the said Hyde and Benson. The several elements or constituent parts of the conspiracy and fraudulent practice which the pleader had to meet and cover are as follows:

(1) School lands were to be obtained from the States of California and Oregon, by and on behalf of the defendants Frederick A. Hyde and John A. Benson, in the names of *fictitious* persons, and such school lands were to be relinquished to the United States by means of false and forged relinquishments, assignments and conveyances, in the names of such *fictitious* persons, in

exchange for public lands to be selected and for titles thereto by patent to be obtained, by and on behalf of the said Hyde and Benson, in the names of such *fictitious* persons.

This element of the conspiracy is charged in the indictment as follows (italics borrowed):

> "* * *—which said school lands were to be so obtained from the said States by making and filing with the said authorities applications for the purchase of the same, * * * *in the names of fictitious persons*, * * * ,—and by supporting such applications with *forged and fraudulent affidavits and affidavits false*, * * *, in this, that they would purport to be, *some the affidavits of real persons*, and others the *bona fide* sworn affidavits of the persons whose names were signed thereto, whereas in truth and in fact the *former*"—those involved in this charge—"would be the affidavits of *fictitious* persons and would not be the affidavits of real persons or affidavits sworn to by *any* person * * *; and whereby the said Frederick A. Hyde and John A. Benson were to cause to be relinquished, assigned, transferred and conveyed, by means of *false* and *forged* relinquishments, assignments and conveyances, to the said United States, * * * *directly*, * * * *the pretended rights* of such *fictitious* persons respectively, * * * and this, * * * in exchange as aforesaid for public lands to be selected, and for titles thereto by patent to be obtained, by and on behalf of the said Frederick A. Hyde and John A. Benson *in the names of such fictitious* * * * persons, * * *

(2) School lands were to be obtained from said States of California and Oregon, by and on behalf of the defendants Hyde and Benson, in the names of *fictitious* persons, and, by means of false and forged relinquishments, assignments and conveyances, such

school lands were to be relinquished, transferred and conveyed to the United States in the names of *real* persons, in exchange for public lands to be selected and for titles thereto by patent to be obtained, by and on behalf of the said Hyde and Benson, in the names of such *real* persons.

This element of the conspiracy is charged in the indictment as follows (italics borrowed):

> "* * *—which said school lands were to be so obtained from the said States by making and filing with the said authorities applications for the purchase of the same, * * * *in the names of fictitious persons*, * * * , —and by supporting such applications with *forged and fraudulent affidavits and affidavits false*, * * *, in this, that they would purport to be, *some the affidavits of real persons*, and others the *bona fide* sworn affidavits of the persons whose names were signed thereto, whereas in truth and in fact the *former*"—those involved in this charge—"would be the affidavits of *fictitious* persons and would not be the affidavits of *real* persons or affidavits sworn to by *any* person, * * * ; and whereby the said Frederick A. Hyde and John A. Benson were to cause to be relinquished, assigned, transferred and conveyed, by means of *false* and *forged* relinquishments, assignments and conveyances, to the said United States, * * * *indirectly* either through the said Frederick A. Hyde, or through divers agents and attorneys of the said Frederick A. Hyde and John A. Benson, * * * *the pretended rights* of such *fictitious* persons respectively, * * * and this, * * * in exchange as aforesaid for public lands to be selected, and for titles thereto by patent to be obtained, by and on behalf of the said Frederick A. Hyde and John A. Benson *in the names of* * * * *real* persons, * * *

(3) School lands were to be obtained fraudulently from said States of California and Oregon, by and on behalf of the said Hyde and Benson: (1) In the names of *fictitious* persons upon assignments of certificates of purchase to be issued by said States, respectively, upon applications to purchase to be filed in the names of *persons not qualified to purchase;* and (2) in the names of *real* persons, (*a*) upon assignments of certificates of purchase to be issued by said States, respectively, upon applications to purchase to be filed in the names of *fictitious* persons, (*b*) upon assignments of certificates of purchase to be issued by said States, respectively, upon applications to purchase to be filed in the names of persons *not qualified to purchase*, and (*c*) directly upon applications to purchase to be filed in the names of persons *not qualified to purchase* (where there were to be no assignments of certificates of purchase); and such school lands, so fraudulently obtained, were to be relinquished, and caused to be relinquished, to the United States by *real* persons, in exchange for public lands to be selected and for titles thereto by patent to be obtained, by and on behalf of the said Hyde and Benson, in the names of such *real* persons.

These elements of the conspiracy are embraced in the following charge (italics borrowed):

> "* * *—which said school lands were to be so obtained from the said States by making and filing with the said authorities applications for the purchase of the same, and assignments of the same, and of the certificates of purchase thereof, *in the names of fictitious persons*, and in the names of persons *not really desiring, and not qualified*, to purchase the same, * * * ,—and by supporting such applications with *forged and fraudulent affidavits and affidavits false*, * * *, in this, that they would purport to be, *some*

the affidavits of real persons, and others the bona fide sworn affidavits of the persons whose names were signed thereto,"—both classes of affidavits being involved in this charge— "whereas in truth and in fact the *former* would be the affidavits of *fictitious* persons and would not be the affidavits of *real persons or* affidavits sworn to by *any* person, and the *latter* would not be the *bona fide or sworn affidavits of the persons whose names were signed thereto*, because such *latter* affidavits would not only state that the affiants therein were persons qualified under the laws of the said State of California, or of the said State of Oregon, as the case might be, to make such applications and to purchase such lands, by reason, amongst other things, of their intending to purchase the same in *good faith and for their own benefit* respectively, and of their having made *no contract or agreement to sell the same*, while in truth and in fact none of such real persons would intend to purchase such lands in *good faith for his own use or benefit at all*, but would be either knowingly aiding and assisting the said Frederick A. Hyde and John A. Benson in their said *fraudulent practice* or innocently acting upon their said false representations, but because, also, the said *latter affidavits would not in truth and in fact have ever been sworn to at all by any of the persons whose names were signed thereto;* and whereby the said Frederick A. Hyde and John A. Benson were to cause to be relinquished, assigned, transferred and conveyed, by means of *false* and *forged* relinquishments, assignments and conveyances, to the said United States, * * * *indirectly* either through the said Frederick A. Hyde, or through divers agents and attorneys of the said Frederick A. Hyde and John A. Benson, * * *, *the pretended rights* of such *fictitious* persons respectively, and require and procure such *real* persons to make relinquishments, assignments, transfers

and conveyances, either directly, or indirectly through the said Frederick A. Hyde or through the said agents and attorneys of the said Frederick A. Hyde and John A. Benson, as would be found convenient or necessary, to the said United States, of the titles to and possession of such school lands so by the use of the names of such *real* persons fraudulently to be obtained from said States, and this, in either case, in exchange as aforesaid for public lands to be selected, and for titles thereto by patent to be obtained, by and on behalf of the said Frederick A. Hyde and John A. Benson *in the names of* * * * *real* persons, * * *

(4) A further element of the conspiracy is that defendants were, by *bribery*, to induce certain United States officials in the General Land Office at Washington, in the District of Columbia, corruptly and contrary to their official duties, to aid defendants to secure the approval of their fraudulent selections, *in advance of their regular order*, and to inform defendants of any *discovery* or *investigation* by the Government of their said fraudulent practice; and also, by like means, to induce certain United States forest reserve officials, corruptly and contrary to their official duties, to aid defendants to secure *new forest reserves* to be established in the States of California and Oregon, in such localities as to embrace undisposed of school lands of said States, respectively, and in such manner as would best serve the interests of defendants in effecting the object of their conspiracy, and to secure the *extension* or *reduction* of forest reserves already established in said States in such manner as would be to the like interests of defendants.

These elements of the conspiracy are embraced in the indictment, as will be seen from the printed records (pp. 15 and 16 in Hyde's case, and pp. 18 and 19 in Dimond's case).

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

FREDERICK A. HYDE, APPELLANT, *v.* JOHN H. SHINE, UNITED STATES marshal for the northern district of California, et al.	No. 406.
HENRY P. DIMOND, APPELLANT, *v.* JOHN H. SHINE, UNITED STATES marshal for the northern district of California, et al.	No. 410.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

SUPPLEMENTAL BRIEF FOR APPELLEES.

We shall try as briefly as possible to show the fallacies, as they seem to us to be, of the opposing arguments at bar.

21245—05——1

1. AS TO "THE USUAL MODE OF PROCESS."

Suppose a charge in removal proceedings in southern New York, on sworn complaint only, of counterfeiting in the western district, and while the preliminary examination is going on an indictment regular on its face just found in the western district is submitted: would the commissioner proceed with the probable-cause inquiry? Would he not instantly hold for an order of removal to the other district of the same State? The law of the State provides that a defendant may be arrested in any county on bench warrant issued on indictment from another county. There is no provision for preliminary examination, but the defendant must give bail or be removed for trial. (New York Criminal Code, secs. 300-303.)

Why should the same rule not obtain if the Federal commissioner receives an indictment for the Federal crime from Pennsylvania, or the District of Columbia, or California? Can it be said that since such a State law is only valid within its borders and between its municipal divisions, its principle offers no guide in the analogous case between Federal districts in different sovereign States, although these districts are the Federal municipal subdivisions for judicial purposes? We say that, construing "process" as "proceedings," we follow the usual State mode of proceeding by the closest possible assimilation when we present

a regular indictment and ask an order in any State having such a law for removal between counties.

We submit with respect that Judge Brown was wrong in the *Greene* case (100 Fed. Rep., 941) in holding that it is necessary to hear evidence as to probable cause whether there is an indictment or not. The New York statutes which he cites as providing for preliminary examination and the hearing of defendant's witnesses are taken from the subdivision of the statutes relating to "arrest before indictment." (New York Crim. Code, sec. 201.) It is appropriate to say here that the California statutes, both on this point and concerning removal between counties, are substantially the same. (California Penal Code, secs. 818–829, 945, 984–988.)

So far as the authorities which the learned judge cites sustain him in this view they also follow an erroneous theory. Judge Brown himself decided the *Dana* case in which his view was first set forth. Examining some of the authorities cited in the *Greene* and *Dana* cases—

Judge Lowell, in *Pope's* case (Fed. Cas., 16069), went beyond the indictment because it showed *on its face* that it involved contradictions respecting dates, and said that it must stand or fall by its own dates; and if these are repugnant or insensible, the pleading is fatally defective and therefore worthless as evidence of a conspiracy.

In *United States* v. *Rundlett* (2 Curt., 41) there was no indictment.

In the *Fowkes* case (49 Fed. Rep., 50) the point arose at the habeas corpus stage and not before the commissioner. The writ and the application for removal were heard together. It was represented that the indictment under section 10 of the interstate-commerce act was found without previous hearing in Missouri against a freight-claim agent of the Philadelphia and Reading Railroad Company, located at Philadelphia, who had never been in Missouri. In view of these representations, Judge Butler permitted the relator to introduce evidence. In reply to the contention that the indictment itself is sufficient, he said that he regarded the matter of further inquiry as an appeal to the court's discretion.

> There can be no doubt of its authority to make such inquiry. The case is before us not simply on the motion for a warrant of transfer under section 1014 of the Revised Statutes, but under the writ of habeas corpus; and in such cases the court may treat an indictment as sufficient authority for holding the relator, or it may not, as the circumstances seem to require. * * * In view of the circumstances under which the indictment was found, I do not regard it as entitled to any greater weight than a magistrate's commitment after hearing.

That is a very different case in essential respects, and is not entitled to much weight here.

In *In re Price* (83 Fed. Rep., 830) the writ of habeas corpus was discharged. The return showed

indictments in the District of Columbia, bench warrants and a warrant of removal from southern New York to this district. The contention of the Government was that bench warrants of the supreme court of this district run into every district of the United States, and are sufficient to remove without any examination either as to identity or probable cause. This view was disapproved, and on that point the Dana case was cited. But the immediate point here was not involved, because at the earlier stage which is now contemplated there was no challenge on the question. There was a complaint on information and belief, and at the hearing "the commissioner proceeded to take testimony both as to identity and probable cause."

Judge Lacombe in no way passed upon the inquiry now presented. He says:

> The district judge treated the indictment merely as proof that the prisoner was wanted for the offense charged in the complaint, and probable cause being established otherwise than by the indictment, properly directed removal.

The point thus passed without contention apparently on the voluntary action of the committing magistrates.

In the case of *United States* v. *Price* (84 Fed. Rep., 636), against the same defendant seemingly, Judge Brown himself delivered the opinion and ordered removal under circumstances which can

not be invoked to sustain his argument on the precise point in the *Greene* case. Indeed, he rather leans to the contrary view.

In *Price v. McCarty* (89 Fed. Rep., 84) the previous proceedings against Price were reviewed by the circuit court of appeals. That court does not pass upon the present question, which was not really presented, and merely holds that the sufficiency of an indictment as to matter of form may properly be left to the trial court; that it is for a district judge to decide under the facts of the particular case whether the ends of justice will be best subserved by granting or refusing the warrant. The opinion says:

> It is to be observed that the statute does not in terms require that an indictment shall have been found against the offender, or that criminal proceedings in any form shall have been instituted against him in the district where he has committed an offense against the laws of the United States. The authority to arrest and remove is conferred in broad terms. Cases may arise where the immediate apprehension of an offender, who is a fugitive from justice, is necessary to prevent his escape from the country, and where, although his guilt is clear, proof can not be presented in time to procure an indictment before he can find refuge in a foreign land. That it is within the constitutional power of Congress to authorize the arrest of an offender against the laws of the United States at any place within the United

> States, and his removal to the place where the offense is triable, can not be doubted. In exercising the authority given by statute, the officers named have wisely insisted generally that it should be made to appear that criminal proceedings in some form have been instituted against the offender within the district where the offense is triable, and usually that an indictment has been found against him; but Chief Justice Marshall, in Virginia, committed Aaron Burr for trial in Ohio, after a hearing before him as committing magistrate, for an offense committed in another district, although no proceedings had been instituted in Ohio.

In *In re Wood* (95 Fed. Rep., 288) the commissioner held the accused to await an order of removal without further evidence than the certified copy of an indictment found in another district. But previously there was a similar proceeding by the Government before another commissioner who heard witnesses and discharged. At that hearing no copy of the indictment was presented, and the district judge held that where the hearing has been full and complete, the action of one commissioner in refusing to commit, unless such action has been arbitrary and in manifest disregard of his duty, ought not to be made the subject of review before a second commissioner.

In short, the authorities cited by Judge Brown for his view do not sustain him, and if they did, we submit that the view is none the less erroneous.

For what does the statute provide? That for any crime against the United States the offender may by any judge or commissioner or State magistrate where he may be found, agreeably to the usual mode of process there, be arrested and *imprisoned or bailed for trial* before the court of the United States having cognizance of the offense. It makes no difference where the offense was committed. The test of jurisdiction is the presence of the offender in the *locus* of the magistrate. The magistrate has jurisdiction of the person because he is in his district, but he has jurisdiction of a crime committed anywhere in the United States—jurisdiction to consider and determine whether the offender should be held to bail. If he institutes an inquiry and an indictment is presented from his own district, would he hesitate to terminate the inquiry and bind the accused over for trial? Would he hesitate if an indictment were presented from another district of the same State? Why should he hesitate? Why should his right and power to commit not be as complete and certain if the offense were committed in a Federal district in another State. There is no reason whatever in law or logic. We call the court's particular attention to *In re Ellerbe* (13 Fed. Rep., 530) and *United States* v. *Yarborough* (122 Fed. Rep., 293).

The consideration which has influenced courts to find reasons for the contrary view is the question of remoteness from the place of trial, the unnecessary fear or suspicion that in a distant part of

the country the people and the courts are less reliable and may indict without warrant and condemn unjustly. Certainly we have passed that point of civilization where the man over the mountains or at the end of the broad plains of the country is a stranger and foreigner, "outlandish" in the sense of primitive days. We are too homogeneous now for that view, too fair and upright in the mass and everywhere, and the courts must come ultimately to the view that this statute means that a regular indictment found in a United States court anywhere is as good standing alone to secure instant removal as a bench warrant running from one county to another of a State.

Why is there a rule for instant removal between counties of a State? Because, though there are different jurisdictions, they are all under the same sovereignty; they are the same people. The larger sovereignty of the United States makes no difference, and greater distances can not change the principle.

Great judgments of the court have said that America has chosen to be, for many and most important purposes a nation; that we are one people (e. g., Chief Justice Marshall in *Cohens* v. *Virginia*, 6 Wh., 264, 413–414; and see *Lane Co.* v. *Oregon*, 7 Wall., 71, 76). This is one of the purposes, and a very important one.

If the United States can trust the comity and justice of a foreign nation and instantly surrender

for trial after the inquiry as to jurisdiction and criminality is over, *a fortiori* may this be done as between different parts of our own country, where the same offenses and defenses are inquired of by equivalent courts under the same Constitution.

It may be that State grand juries sometimes seek to indict unjustly and recklessly persons in remote States who have never been in the complaining jurisdiction; that fact should not control the Federal situation, and such danger may safely be left to the constitutional defenses and various other checks available in interstate rendition proceedings.

But all this is largely beside the point. The Government did not resist the opening of the case, it did not choose to supplement the indictment, but its witnesses were there and the defendants examined them and did not see fit to call any witnesses of their own, but Dimond himself volunteered. Then the commissioner and the district judge found probable cause. It will not do to say that the courts did not consider the evidence because the opinions do not say so. The presumption is to the contrary. Was it indeed necessary for the circuit court to examine *de novo* and affirm the finding of probable cause, and is it possible to suppose that this court must and will do so?

2. AS TO EXCURSIONS OUTSIDE THE RECORD.

The strictures on the Government here are unjust. The first count of the indictment charges

(Hyde rec., p. 13) a *conspiracy* to defraud the United States out of "divers large tracts of the public lands of the said United States open and *to be open* to selection;" that the bribing of Allen and Taggart, the forest-reserve officials, was *to secure* (p. 16), by divers means (e. g., influencing them upon the "advisability of including or not including" Government lands in forest reserves), *the establishment of forest reserves* in such localities as would, by reason of the location and relations of State school lands, benefit the object of the conspiracy.

This all speaks of the future, and it is perfectly obvious how including or not including, or excluding, Government lands might affect the value of school lands in the various neighborhoods actually secured by the conspirators or easily available to them. Then the count goes on to a particular overt act and minute specification—thus (p. 18), "in pursuance of the said unlawful conspiracy" and "to effect the object of the same," and defraud the United States out of *certain* tracts, describing them with particularity, Dimond filed a certain application, etc. And so on through many counts on the different related conspiracies and overt acts. Dimond, a co-conspirator and agent of Hyde and Benson, was manifestly residing in Washington to further this scheme through much of the period in question. The face of the indictment states that and shows it also from his letters.

Now, because we allege one overt act in pursuance of each conspiracy, can we not prove others as well? Can we not properly say from this indictment that as to other lands, within the conspiracies charged, but not embraced in *these* overt acts, patents have not been issued, and ask what is the Secretary to do? The *established* forest reserves set out refer only to the particular overt acts charged. May we not properly say that the charge of bribing Allen and Taggart manifestly refers to *other* reserves, *to be established* by their aid, collusively and dishonestly obtained? Certainly we can prove all that when we come to trial, and the averments fully justify what we said in reply to counsel's flat charge that we averred bribery to influence the establishment of forest reserves and that all the forest reserves which we described particularly, or could possibly refer to, had long been established. That is simply not true, as we have now pointed out.

In short, on the point that the indictment mentions by name only forest reserves which were established before the date of the conspiracy described in the indictment, it is to be noted that such forest reserves are mentioned only in those parts of the indictment which set forth the overt acts. In that part of the indictment which describes the conspiracy as a whole, before the overt acts are mentioned, it is alleged that the conspiracy was one to exchange lands which were to be

secured by the appellants within the limits of forest reserves which were to be established, as well as within forest reserves which had already been established.

It is well settled that the pleader can not rely upon the allegations describing the overt acts for a description of the conspiracy itself. (*United States* v. *Britton*, 108 U. S., 199.) The converse of this proposition is that the defendant can not point to the overt acts as a description of the conspiracy, and can not rely upon the overt acts set forth as prohibiting the prosecution from introducing evidence in support of the complete description of the conspiracy set out in the indictment prior to the overt acts. The proper place for these defendants to raise the point involved in this contention is in the trial court after the Government has put in all its proof and it appears that the conspiracy is not in fact proven as described.

3. THE CONTENTS OF THE INDICTMENT.

The learned gentlemen intimate, or indeed express, the opinion that the indictment is not only unnecessarily prolix and involved, but purposely so in order to serve as a drag-net. There never was a more perfect illustration of putting the cart before the horse. It is the scheme which is complicated, and considering its nature and object, it is more than likely that it was intended to be so. Concealment, tortuousness, and protean aspects are characteristic of such methods and intentions.

We repeat that the pleader has stated the facts with skill and accuracy and with all possible brevity.

With due respect to the learned judges who passed upon the instrument, they failed to apply searching scrutiny, and therefore they were under a total misapprehension of its necessary meaning. Judge Lacombe thinks that upon the broadest construction the facts do not tend to show conspiracy to defraud; that the United States would have obtained a perfect title, and had no concern with the methods by which that title was secured from the State. He does not realize that even if no school lands were offered for exchange except those covered by patent, the *patent* might be *void* because in a *fictitious* name. Judge Morrow conceives that the charge embraced only titles obtained fraudulently from the State by means of *applications for purchase* in fictitious names, and rested his decision on the view that this was a fraud because a perfect and indefeasible title would not be conveyed and the Government can not deal in fraudulent titles.

We submit on the analysis at the end of our brief that the case of a State *patent* in a *fictitious* name is covered. The opposing argument that the mere word "title" concedes and warrants a complete right from the State to a real person, however fraudulent the means or fictitious the persons through the preliminary stages, can not be sustained. Judge De Haven, indeed, recognized this,

notwithstanding his unfavorable comment on the indictment, for he says:

> It is not directly alleged that the defendants were to obtain any patent from either of the States referred to in which a fictitious person should be named as grantee, although it must be conceded there is an averment which seems to imply, and from which it may be argued with much force, that patents of that character were to be obtained.

4. FORGED CONVEYANCES.

The indictment specifically and unequivocally alleges that one of the means by which the United States was to be defrauded was that of conveying the school lands acquired from the States of California and Oregon to the United States by "means of false and *forged* relinquishments, assignments, and conveyances to the said United States directly," in exchange for lands of the United States.

It is hornbook law that a *forged* instrument does not operate to convey even a voidable title. Such an instrument is absolutely void *ab initio*. Hence the defendants' scheme involved, in part at least, the obtaining of titles from the United States in the names of real persons without giving anything whatever of value in exchange, and it can hardly be contended that this would not or does not constitute a conspiracy to defraud the United States.

5. HYDE'S CLAIM OF ALIBI.

That a person charged with crime can not say that he is not a resident of the place where he commits an offense, see 1 Chitty, Cr. L., 210, where it is said:

> In practice, where a felony or other offense has been committed at A, in the county of B, the usual and better course is to state the defendant's addition of the same place, viz, I. S, late of A, in the county of B, although his place of abode may be in another county; *because he is considered as having been conversant in the county where the offense was committed.*

In the face of the foregoing, how can it be said that the appellants are not residents of the District of Columbia, if they committed the offense here? They beg the question on this point by saying that they committed the offense in California, if anywhere. They certainly did not, and could not, commit, in California, the offense of conspiring in the District of Columbia, which is charged in the indictment. If they committed any offense there, it is a distinct offense from the one committed in the District of Columbia. The most that can be said is that the defendants might, if convicted in one district, plead that conviction if they should be indicted in the other district on the same facts.

It is submitted that proof of an alibi by one of the defendants would be no defense upon the trial of a conspiracy indictment, because he may

still have been guilty of a conspiracy and indictable in the district where an overt act was committed by another conspirator, although he was not himself there physically present. He can not deny that the overt act was his act, although committed by another defendant and in another district, it being proven that he was working in concert with all the defendants. Moreover, the act of an innocent agent within the District would be as much his own act as if he were there physically present when it was committed.

6. THE LAW OF CONSPIRACY.

It is the existence of a conspiracy at the time, not the formation, which is important. In one aspect, of course, the conspiracy is the crime, the gist of the offense; it is true that an overt act, now essential, fixes a *locus penitentiæ;* equally true is it that overt acts manifest the crime, reveal its evil fruits, and may establish it as vital and continuing. That is what is meant when it is said that overt acts renew the illegal agreement. One overt act perhaps can not prove a conspiracy as existing; one overt act perhaps can not revive a conspiracy otherwise barred; a series of overt acts is a very strong circumstance, as evidence, of the present force and reality of an antecedent conspiracy. So most conspiracies must be proved. Consider the contrary view: Is it possible that conspirators may commit some trifling overt act,

lie by for three years, and then proceed with impunity? A later series of acts would clearly show, or tend to show, the confederation surviving through all the intervening time, or renewed, and effective at the end.

The confusion on the subject is due to a failure to reason clearly from the agreement to its results. Both must be regarded as factors. The subject is largely circumstantial of necessity, and different minds may vary widely as to the relation and effect of a given act respecting the original combination. Thus we submit that Judge Bunn was in error in the McCord case. In that case a conspiracy was formed and various overt acts committed more than three years before indictment, and then there was an overt act within three years. The Government seems to have conceded that the original conspiracy was barred, and introduced evidence of it merely to show the intent with which the later or new conspiracy, as it was claimed to be, was formed. The court held that there was not sufficient evidence to show a distinct conspiracy within the statute of limitations. It may well be doubted whether this ruling was correct and whether the case should not have been submitted to the jury, for the statement shows that there were several acts and circumstances tending to prove that the conspiracy was *in existence* within the statutory period.

The vice of the reasoning is that in repudiating

the idea of a continuing offense the court went much too far. It was said that it is continuing only in the sense of admitting a late comer and charging him with all the previous acts of his co-conspirators, and that the statute does not begin to run anew from the commission of every overt act. The latter proposition standing alone is probably sound. The evidence, however, was properly introduced to show that a conspiracy *existed* within three years, and the court erroneously regarded only its *formation* and supposed indivisibility. If the transaction showed different conspiracies to effect the same object, then they *can* be "split up;" or if they show a renewal, or revival, or continuance—the unlawful agreement existing at the time of the later overt acts—then the statute *does* begin to run anew.

The precise question has been before this court recently. It was raised on the application of Machen and others for certiorari. The point was obvious and important in that case, but the court refused the writ. The indictment there charged separate conspiracies, and alleged different overt acts in furtherance of each. The defendants requested the trial court to charge that if *a conspiracy* to defraud the Government in substantially the same manner as charged had been entered into, and an overt act committed more than three years before indictment, the prosecution was barred.

The trial court refused so to charge, having charged at the request of the prosecution that—

> It is not necessary for the Government to show, or for the jury to find, that the several conspiracies charged in the indictment, or any of them, were entered into upon the particular dates mentioned in the indictment. It is sufficient if it appear that the conspiracies alleged were entered into at any time within the period of three years before the filing of the indictment.

Upon this point the court of appeals ruled that by "the repetition of such acts—overt acts they are commonly called—the conspiracy is made a continued offense. By each subsequent act it is repeated and entered into anew." [Citing *People* v. *Mather*, 4 Wend., 259; *Commonwealth* v. *Bartilson*, 85 Pa., 482, 489; *United States* v. *Greene*, 115 Fed. Rep., 543 (Judge Speer), and other cases: *q. v.*]

The Government construed this statement of the court of appeals to mean that when there was competent proof that a corrupt agreement existed, and overt acts had been committed within the period of limitation, it was immaterial whether a similar conspiracy had been entered into several years before. We submit, therefore, that when the apparently conflicting decisions on this question are interpreted properly they will be found to be harmonious and to establish this general rule:

> That the commission of an overt act alone would not be sufficient to renew a conspiracy

> already barred, but that if a sufficient number of overt acts or transactions of the individual conspirators were proven to have been committed within the period of the statute which would justify a jury in finding as matter of fact that a conspiracy was in existence, then and in such case it would amount to a renewal of the conspiracy.

(See brief for the United States in Lorenz, Machen, et al., petitioners, etc., No. 490 of the present term, pp. 40–48.)

We submit to the court now an indictment precisely similar to that in the Machen case, in which there is due averment of separate conspiracies formed in the District of Columbia within three years, which would be satisfied by proof of different dates within that period than those alleged. It is certain that we should be permitted an opportunity to prove the offenses before the proper trial court.

The accused have much to say about Article VI of the amendments, which secures a *speedy* trial in the district where the crime was committed. If the Government had indicted in California or Oregon, these defendants would undoubtedly be saying that their right to a speedy trial in the proper district had been violated; that, if any crime at all had been committed, the acts in the West were only preliminary and formal, while the formation and existence of the conspiracies here—where one ofthe conspirators in person (Dimond)

was continuously serving the unlawful interests, and the significant and final acts were performed and to be performed—designated the District of Columbia as the proper trial district.

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